120 - 63

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1886.

No. ~~320.~~ 93

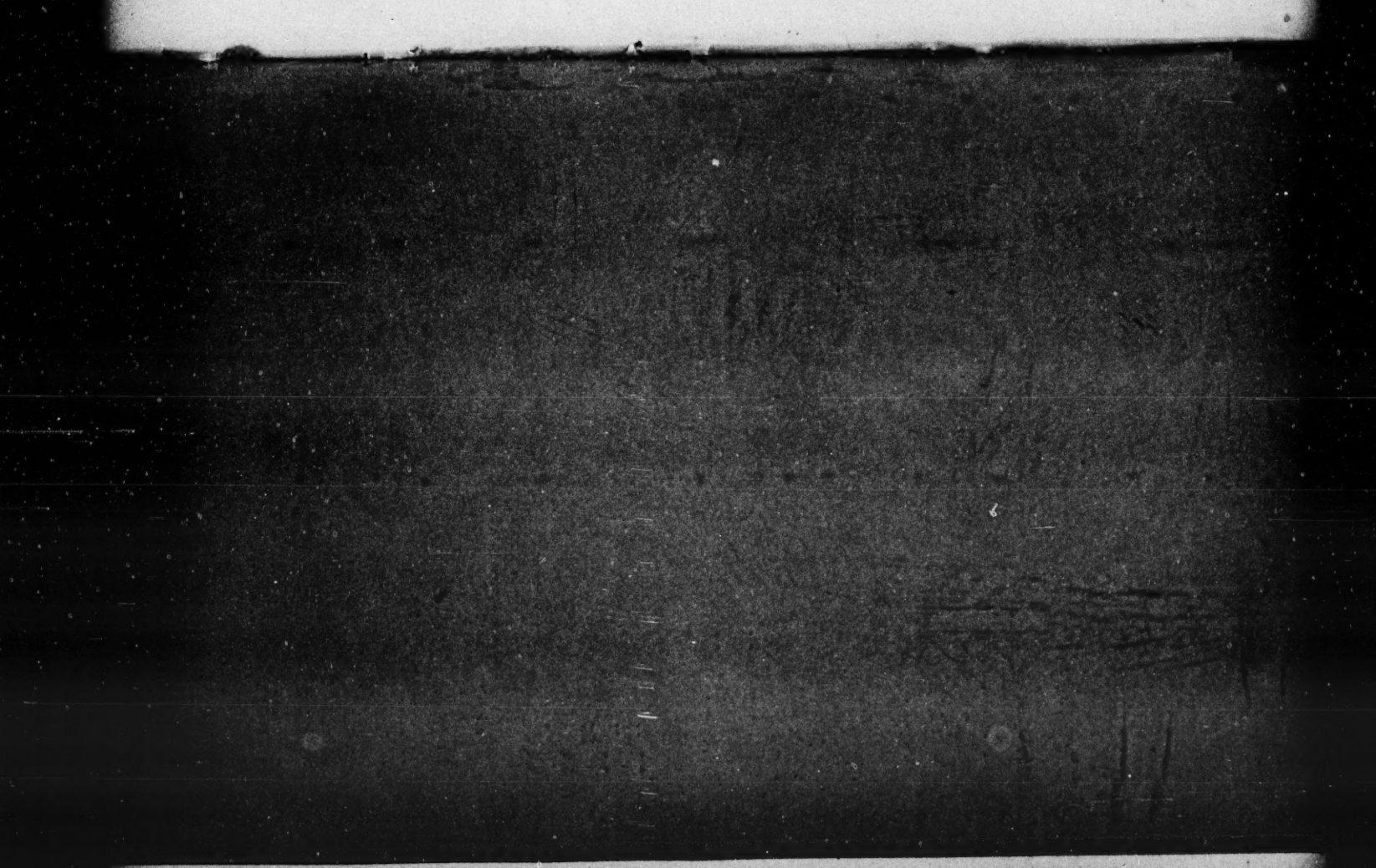
JOHN A. DUSHANE AND JOHN W. STONEBRAKER,
PLAINTIFFS IN ERROR,

vs.

JOSEPH BENEDICT.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF PENNSYLVANIA.

FILED OCTOBER 6, 1886.



SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1885.

No. 345.

JOHN A. DUSHANE AND JOHN W. STONEBRAKER,
PLAINTIFFS IN ERROR,

vs.

JOSEPH BENEDICT.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF PENNSYLVANIA.

INDEX.

	Original.	Print.
Caption	1	1
Appearance docket entries	1	1
Transcript from State court	4	2
Appearance docket entries	4	2
Precipe for foreign attachment, &c.	6	3
Foreign attachment	11	5
Sheriff's return	12	6
Affidavit of defense	13	6
Rule to plead	16	8
Plea	17	8
Rule for judgment	17	8
Motion to strike off rule for judgment	18	9
Precipe for judgment	19	9
Appearance of W. Macrum	20	10
Order amending record	21	10
Supplemental affidavit of defense	21	11
Plea	26	13
Counter affidavit of claim	26	13

JUDD & DETWEILER, PRINTERS, WASHINGTON.

	Original.	Print.
Petition for removal	29	14
Bond "	31	15
Minutes of trial	33	16
Motion for new trial	34	16
Order on motion for new trial	36	17
Judgment docket entries	37	17
Writ of error	38	18
Bill of exceptions	39	18
Plea	39	18
Original affidavit of defense	40	19
Supplemental affidavit of defense	43	20
Testimony of Joseph Benedict	47	22
John W. Stonebraker	49	22
Chas. B. Boyle	51	24
Mrs. Elizabeth Keyser	52	24
Lulu Cramer	53	24
Mrs. Missouri Garlock	54	25
Miss Kate Saylor	55	25
James H. Jackson	55	25
Sam'l E. Craley	58	26
Mrs. Lydia Cramer	59	27
Michael Fouke	59	27
Alice Koonz	60	27
J. Frank Fouke	61	27
Mrs. Elizabeth M. Craley	61	27
Mrs. Elizabeth Keyser	62	28
John W. Stonebraker	62	28
James H. Jackson	62	28
Geo. W. Crum	63	28
Michael Fouke	63	28
James F. Fouke	63	29
Miss E. M. Craley	64	29
W. H. Daly, M. D.	64	29
C. Hoch	65	29
John Werth	66	29
James Harrison	66	29
Record of shipments	66	29
Exhibit "A"—Letter of Joseph Benedict to Antietam Paper Co., Feb'y 7, 1882	67	30
No. One—Letter of Antietam Paper Co. to Joseph Benedict, March 6, 1882	68	31
"B"—Letters of Joseph Benedict to Antietam Paper Co., March 8, 1882	69	31
"C"—Letter of Joseph Benedict to Antietam Paper Co., M'ch 20, 1882	72	32
"No. 2"—Letter of Antietam Paper Co. to Joseph Benedict, M'ch 21, 1882	71	32
Charge of the court	74	33
Exceptions to charge	76	34
Certificate to record	78	35
Citation	79	35
Service of citation	80	35

1 Among the rolls, records, and judicial proceedings had in the circuit court of the United States for the western district of Pennsylvania, wherein Joseph Benedict is plaintiff and The Antietam Paper Company *et al.* are defendants, entered at No. 45, May term, 1883, may be found the following words and figures, to wit:

Appearance. Docket Entries.

JOSEPH BENEDICT
vs.
JOHN A. DUSHANE and JOHN W. STONEBRAKER, Partners as The Antietam Paper Company, D. Hostetter, and George W. Smith, Garnishees. } No. 45.

[On the margin:] Josiah Cohen, A. H. Clarke, W. Macrum.

Record on removal of cause from the common pleas court, number one, of Allegheny county, Pennsylvania.

April 18, 1882. Foreign attachment in case to first Monday in May, 1882. Affidavit filed and —— Smith and D. Hostetter summoned as garnishees. Bail required in $1,600. Executed April 18, 1882, on D. Hostetter and George W. Smith; *N. E. I.* as to def'ts. May 25, 1882. Affidavit of defence filed. May 31, 1882. Rule on defendant to plead; *eo die*, plea filed. June 1, 1882. Rule and reasons for judgment for want of a sufficient affidavit of defence filed.
2 June 17, 1882. Rule on pl'ffs to show cause why rule entered on 17th June, inst., should not be stricken from record. Sept. 4, 1882. On argument list and rule discharged; *eo die*, rule absolute as to rule and reasons for judgment. Sept. 5, 1882. And judgment liquidated at eight hundred and thirty-three $\frac{83}{100}$ dollars. Sept. 9, 1882. Rule granted to show cause why order of 5th inst. should not be rescinded and the rule *ex parte* defendant granted. June 15, 1882. Made absolute and the judgment entered on the 5th inst. stricken off, proceedings stayed in [the] meantime. Sept. 16, 1882. On argument list and rule absolute; *eo die*, rule to plead stricken off and defendants allowed thirty days to file supplemental affidavit of defence. Rule for judgment to be reinstated. Oct. 14, 1882. Supplemental affidavit of defence filed. Nov. 28, 1882. Rule discharged and same day plea filed. Nov'r 29, 1882. Counter-affidavit of claim filed. Dec. 29, 1882. Rule for a commission to issue to Joseph Kausler to take depositions on part of defendants. Interrogatories filed. February 7, 1883. Cross-interrogatories filed. March 7, 1883. Petition presented and ordered to be filed and bond approved.

1883, April 18. Transcript of record from the court of common pleas, number one, of Allegheny county, Pennsylvania, in the above case filed. 1883, May 15. Case called for trial and jury sworn, and case proceeded with. 1883, May 16. Jury render a verdict
3 for the plaintiff for the sum of eight hundred and sixty-six and $\frac{31}{100}$ ($866.31) dollars. 1883, May 17. Motion and reasons for a new trial filed. 1883, May 21. Motion for a new trial argued, *C.*

A. V. 1883, May 23. Motion for a new trial overruled. May 23, 1883. Judgment upon the verdict herein. H. D. Gamble, clerk. 1883, May 24. Plaintiff's bill of costs filed. 1883, July 30. Writ of error to this court, returnable in the U. S. Supreme Court on the 2nd Monday of October next, allowed, M. W. Acheson sitting as U. S. circuit judge; filed same day, citation to plaintiff, returnable on a like day with the writ of error herein, allowed; also, on same day, defendants' bill of exceptions, sealed by M. W. Acheson, J., filed.

4 *Exemplication of Record.*

COMMONWEALTH OF PENNSYLVANIA, } *sct:*
Allegheny County, }

Among the records and proceedings of the court of common pleas, No. one, in and for the county of Allegheny and State of Pennsylvania, the following may be found as matter of file and of record at No. 256, June term, 1882, to wit:

Appearance. Docket Entry.

JOSEPH BENEDICT
vs.
JOHN A. DUSHANE and JOHN W. STONEBRAKER, Partners as the Antietam Paper Company (now residents of Penna.) } 256. Narr.

April 18, 1882. Foreign attachment in case to 1st Mon., May, 1882. Aff't filed and summon Dr. D. Hostetter and —— Smith as garnishees. Bailed required in $1,600. "Executed April, 18, 1882, on D. Hostetter and George W. Smith, and *N. E. I.* as to defendants." May 25th, 1882. Affidavit of defence filed. May 31, 1882. Rule on def'ts to plead *sec reg; eo die* plea filed. June 7, 1882. Rule and reasons for judgment for want of a sufficient aff't of defence filed. June 17, 1882. The court grants a rule on pl'ff to show cause why the rule entered on the 17th June, inst., should not be stricken off from the record. Sept. 4, 1882. On argument list and rule discharged;
5 *eo die* rule absolute as to rule & reasons for judgment. Sept. 5, 1882. And judgment liquidated at eight hundred and thirty-three $\frac{03}{100}$ dollars ($833.03.) Sept. 9, 1882. Rule granted to show cause why the order entered on the 5th inst. should not be rescinded and the rule *ex parte* def't granted. June 15, 1882. Made absolute and the judg't entered on the 5th inst. stricken off as having been improvidently entered, proceedings stayed in the meantime. Sept. 16, 1882. On argument list and rule absolute; *eo die*, it appearing to the court that the rule to plead was entered without authority of plaintiff's att'y by his clerk, the same is now stricken off by consent of counsel for both parties, and def't allowed thirty days to file supplemental aff't of defence. Rule for judgment to be reinstated. Oct. 14, 1882. Supplemental aff't of defence filed. Nov. 28, 1882. Rule discharged. Nov. 28, 1882. Plea filed. Nov. 29, 1882. Counter-affidavit of claim filed. Dec. 29, 1882. Rule for a commission to issue to Joseph Causler to take depositions on part of def't filed.

Interrogatories filed. Feb'y 7, 1883. Cross-interrogatories filed. March 7, 1883. Petition presented and ordered to be filed, and bond approved.

6 *Precipe, &c.*

ALLEGHENY COUNTY, *ss:*

Common Pleas Court, No. One, of Allegheny County, Pennsylvania. June Term, 1882.

JOSEPH BENEDICT
vs.
JOHN A. DUSHANE and JOHN W. STONEBRAKER, Partners as the Antietam Paper Company, non-residents of the Commonwealth of Pennsylvania, and not now residing in the County of Allegheny. } No. ——.

Issue foreign attachment in case returnable to first Monday, May, 1882. Bail required, $1,600.00. Attach the goods and chattels, moneys, rights, credits and effects, lands, and tenements of the defendants in the hands, possession, or custody of Dr. D. Hostetter and —— Smith, partners as Hostetter & Smith, First Ave., Pittsburgh, Pa., and summons them as garnishees.

JOSIAH COHEN,
Att'y for Pl'ff.

To J. O. Brown, pro.

Apr. 18, 1882.

COMMONWEALTH OF PENNSYLVANIA, }
County of Allegheny, } *ss:*

7 Joseph Benedict, above-named plaintiff, being duly sworn, says that John A. Dushane and John W. Stonebraker, partners as Antietam Paper Co., the above defendants, are non-residents of this Commonwealth and are not at this present time within the jurisdiction of the above-named court; that said defendants are justly, truly, and legally indebted to said plaintiff in the sum of eight hundred and thirteen [and] $\frac{03}{100}$ dollars, with interest thereon from April 10th, 1882, said indebtedness being the amount of certain bill of merchandise sold by pl'ff to said defendants, a true and correct copy of which, as copied from pl'ff's books of original entry, is hereto attached as "Exhibit A" and made part hereof. That the whole of said sum of $813.03, with interest as aforesaid, remains wholly due and unpaid from said defendants to this pl'ff; all of which is true as affiant verily believes.

JOSEPH BENEDICT.

Sworn to and subscribed before me this 18th April, 1882.
J. O. BROWN, *Pro.*

"EXHIBIT A."

ALLEGHENY COUNTY, *ss:*

Court of Common Pleas, No. One.

PITTSBURGH, *April* 18*th*, 1882.

M. Antietam Paper Co. bought of Joseph Benedict, dealer in rags, iron, metal, &c., No. 48 Wyley avenue. The highest price
8 paid for woolen rags.

1882.					
Febr. 7.	10 bales	m'x'd book-stock, 6,871 lb, @ 2⅞	197 54		
	9 "	white shavings, 3,417 lb, @ 3⅞	132 41		
	8 "	colors, 3,838 lb, @ 2.30	88 27		
	5 "	blues, 2,410 lb, @ 3⅛	75 31		
			493 51		
	Less freight		28 11		
					465 42
" 8.	28 bales	colors, 12,882 lb, @ 2.30	296 29		
8.	5 "	blues, 2,477 lb, @ 3⅛	77 41		
			373 70		
	Less freight		26 09		
					347 61
					813 03

In the Court of Common Pleas, No. 1, of Allegheny County. Of June Term, 1882.

JOSEPH BENEDICT
vs.
JOHN A. DUSHANE and JOHN W STONEBRAKER, Partners as Antietam Paper Company, non-residents of the Commonwealth of Pennsylvania and not now residing in County of Allegheny. } No. —.

ALLEGHENY COUNTY, *ss:*

John A. Dushane and John W. Stonebraker, partners as Antietam Paper Company, non-residents of the Commonwealth of Pennsylvania and not now residing in the county of Allegheny, the
9 defendants in this suit, were summoned to answer Joseph Benedict, the plaintiff in this suit, of a plea of trespass on the case.

Whereupon the said plaintiff, by Josiah Cohen, his attorney, complain- for that whereas the defendants, on the 7th and 8th days of February, in the year of our Lord one thousand eight hundred and eighty-two, at Pittsburgh, to wit, in the county aforesaid, were indebted to said plaintiff in the sum of eight hundred and thirteen $\frac{03}{100}$ dollars for the price and value of goods then and there sold and delivered by the plaintiff to the defendants at their request.

And — the sum of eight hundred and thirteen $\frac{03}{100}$ dollars for the price and value of work then and there done by the plaintiff for the defendants at their request.

And in the sum of eight hundred and thirteen $\frac{03}{100}$ dollars for money then and there lent by the plaintiff to the defendants at their request.

And in the sum of eight hundred and thirteen $\frac{03}{100}$ dollars for money then and there received by the defendants for the use of the plaintiff.

And in the sum of eight hundred and thirteen $\frac{03}{100}$ dollars for money paid, laid out, and expended by the plaintiffs for the defendants at their request.

And in the sum of eight hundred and thirteen $\frac{03}{100}$ dollars for money found to be due from the defendants to the plaintiff on an account then and there stated between them.

And whereas the defendants afterwards, to wit, the day and year aforesaid, in consideration of the premises, had then and there promised to pay the said several sums of money, respectively, to the plaintiff on request; yet they disregarded their promises and have not paid any of the said moneys, or any part thereof, to damage of said plaintiff sixteen hundred dollars; and therefore he brings suit, &c.

JOSIAH COHEN,
Attorney for Plaintiff.

Indorsed: No. 256. June term, 1882. Joseph Benedict *vs.* Antietam Paper Co. Precipe for for. att. Bail required, $1,600. Narr. and affidavit. Hostetter and Smith, garnishees. Iss'd Ap'l 18, 1882. Cohen.

Foreign Attachments.

ALLEGHENY COUNTY, *ss:*

Court of Common Pleas, No. One.

The Commonwealth of Pennsylvania to the sheriff of said county, [COURT SEAL.] Greeting:

We command you that you attach John A. Dushane and John W. Stonebraker, partners as the Antietam Paper Company, non-residents of the State of Pennsylvania, and not now being within the county of Allegheny, late of your county, by all and singular their goods and chattels, lands, and tenements, in whose hands or possession soever the same may be, so that they be and appear before our court of common pleas, No. 1, to be holden at Pittsburgh, in and for said county, on the first Monday of May next, there to answer Joseph Benedict.

And you, the said sheriff, are hereby commanded to summon Dr. D. Hostetter and —— Smith, partners as Hostetter & Smith, and all other persons in whose hands or possession the said goods and chattels, lands, and tenements, or any of them, may be attached, so that they be and appear before our said court on the day and place men-

tioned in the above writ to answer what shall be objected against them and abide the judgment of the said court therein; and have you then and there this writ.

12 Witness the Hon. E. H. Stowe, Esquire, president judge of our said court, the 18th day of April, anno Domini one thousand eight hundred and eighty-two.

J. O. BROWN, *Prothonotary.*

Indorsed: No. 256. June term, 1882. Joseph Benedict *vs.* The Antietam Paper Company. Foreign attachment in case to first Monday, May, 1882. Bail required in $1,600. J. Cohen, plaintiff's attorney. Executed April 18th, 1882, by serving a true and attested copy of this writ at the residence of Dr. D. Hostetter, and same day by serving a true and attested copy of this writ at the residence of George W. Smith, with an adult member of each of their families, and by summoning each of them as garnishees. *N. E. I.* as to def'ts. So answers. Wm. McCallin, sheriff. Sheriff, McC., 2.50; M., 1.00.

13 *Affidavit of Defence.*

ALLEGHENY COUNTY, *ss:*

In the Court of Common Pleas, No. One, Allegheny County, Pennsylvania. June Term, 1882.

JOSEPH BENEDICT
vs.
JNO. A. DUSHANE and JNO. W. STONEBRAKER, Partners as the Antietam Paper Company. } No. 256.

Personally appeared John W. Stonebraker, who, being duly sworn according to law, on oath says that defendants have a just and legal defence to the whole of plaintiff's demand, the nature and character of which is this: that the rags sent from plaintiff to defendant's mill, at Hagerstown, Md., on or about the 7th day of February, 1882 (the value of which being plaintiff's foundation for this suit), were infected with smallpox, as deponent is informed and believes, and expects to be able to prove, the disease, smallpox, being epidemic at the city of Pittsburgh and Allegheny City at and prior to the date of shipment. Deponent further says that in about ten days after the receipt of the rags at the mill, and the handling and assorting of some of them, smallpox and varioloid attacked several of the men so employed, and then spread to the town of Hagerstown, many cases having proved fatal. Deponent at once

14 notified plaintiff that the rags had introduced the smallpox into the community where the mill is located and that several of defendant's employees were attacked, and that the rags were at his, plaintiff's, disposal, and plaintiff ordered them shipped to C. P. Markee & Son, but that this was impossible, as the board of health of Hagerstown would not permit their removal through the streets.

Deponent further says that he is informed by those who were engaged in assorting these rags that they gave evidence of attempts

being made to disinfect them, and that he expects to be able to prove that the breaking out and prevalence of smallpox at defendant's mill was wholly owing to the rags, which conveyed it from Pittsburgh, the place from which they were gathered and shipped.

Deponent further says that these rags have caused, and are still causing, defendants great loss and damage, and their presence in the mill, where a greater portion of them still remains, a terror and fright to all in the neighborhood.

Deponent further says that prior to the receipt and opening of the bags of rags there was no smallpox anywhere near the mill or Hagerstown, and he is informed and believes, and expects to be able to prove, that its appearance can be traced immediately to the rags shipped by plaintiff.

15 And deponent further says that, by reason of the facts above stated, defendants are not indebted to plaintiff in the amount claimed, if in any sum, and that part of the rags are still at the said paper mill, subject to the disposal of plaintiff; and further deponent saith that he verily believes, and has reason to know, that the breaking out of the said disease at his said mill has caused, in the expenditure of money, stoppage in work, and hurt and injury to the defendants' business, a pecuniary loss of the amount of plaintiff's claim.

And further deponent saith not.

J. W. STONEBRAKER.

STATE OF MARYLAND, *Washington County*, } *To wit:*

I hereby certify that on this 22nd day of May, A. D. 1882, before me, the subscriber, a notary public of the State aforesaid, in the county aforesaid, personally appeared John W. Stonebraker (personally known to me to be the person so named), and made oath in due form of law that the matters and things stated in the foregoing affidavit are true and *bona fide*, as therein set forth, to the best of his knowledge and belief; and I further certify that the said John W. Stonebraker at the same time subscribed his name to the said affidavit.

16 In testimony whereof I have hereunto set my hand and affixed my notarial seal the day and date above written.

JOS. KAUSLER, [SEAL.]
Notary Public.

Indorsed: No. 256. June term, 1882. Joseph Benedict *vs.* Jno. A. Dushane and Jno. W. Stonebraker. Filed May 25, 1882. A. H. Clarke.

Rule to Plead.

ALLEGHENY COUNTY, *ss*:

Court of Common Pleas, No. One. June Term, 1882.

JOSEPH BENEDICT
vs.
JOHN A. DUSHANE and JNO. W. STONEBRAKER, Partners as the Antietam Paper Co. } No. 256.

Enter rule on defendants to plead in ten days, or judgment *sec reg.*

May 29, 1882.

JOSIAH COHEN,
Pl'ff's Att'y.

J. O. Brown, pro.

Indorsed: No. 256. June term, 1882. Benedict *vs.* Antietam Paper Co. Rule to plead. Filed May 31, 1882. Cohen.

17 *Plea.*

ALLEGHENY COUNTY, *ss:*

Court of Common Pleas, No. One.

BENEDICT *vs.* DUSHANE *et al.*

MAY 31, 1882.

Deft's' pleads payment, with leave to give special matter in evidence and set-off, with leave also to add, alter, and amend at bar.

W. B. RODGERS,
Att'y for Def'ts.

Indorsed: No. 256. June term, 1882. Benedict *vs.* Dushane. Plea. Filed May 31, 1882. Rodgers.

Rule for Judgment.

ALLEGHENY COUNTY, *ss:*

Court of Common Pleas, No. One. June Term, 1882.

JOSEPH BENEDICT
vs.
JOHN A. DUSHANE and JOHN W. STONEBRAKER, Partners as the Antietam Paper Co. } No. 256.

18 And now, to wit, June 7, 1882, rule on defendants to show cause why judgment should not be entered against them for want of a sufficient affidavit of defence for the following—

Reasons.

1. The affidavit of defence filed herein is evasive and evidently intended for the purpose of delay.

2. The facts therein set forth do not constitute a good defence in law.

3. There is no averment therein that defendants will be unable to prove, on the trial hereof, the facts therein set forth.

June 7, '82.

JOSIAH COHEN,
Pl'ff's Att'y.

Indorsed: No. 256. June T., 1882. Benedict *vs.* Antietam Paper Co. Rule for judgment for want of sufficient affidavit of defence. Filed June 7, 1882. Cohen.

Motion to Strike Off Rule for Judgment.

ALLEGHENY COUNTY, *ss:*

Court of Common Pleas, No. One. June T., 1882.

BENEDICT
vs.
ANTIETAM PAPER COMPANY. } No. 256.

JUNE 15, 1882.

19 On motion of defendants' attorney, the court grant a rule on plaintiff to show cause why the rule entered on the 7 inst. should not be stricken from the record.

By the court.

Reasons in Support of the Above Rule.

1. The plaintiff by calling on defendants to plead has waived his right to judgment for want of a sufficient affidavit of defence.
O'Neal *vs.* Rupp, 10 Harris, 395.

2. This action, having been begun by foreign attachment, is not within the perview of the rule requiring affidavits of defence.
Grant *vs.* Hickcox, 14 P. F. Smith, 334.

Indorsed: No. 256. June T., 1882. Benedict *vs.* Antietam Paper Company. Rule *ex parte* defendants. Filed June 17, 1882.

Precipe for Judgment.

ALLEGHENY COUNTY, *ss:*

Court of Common Pleas, No. One. June T., 1882.

JOSEPH BENEDICT
vs.
JOHN A. DUSHANE and JOHN W. STONEBRAKER, Partners as the Antietam Paper Co. } No. 256.

Claim	$813 03
Interest	20 00
	$833 03

20 Enter judgment as above liquidated against defendants in accordance with order of court of Sept. 4, 1882, making rule for judg't "absolute."

J. COHEN,
Att'y for Pl'ff.

To J. O. Brown, Esq., pro., Pittsburg, Sept. 5, 1882.

Indorsed: No. 256. June term, 1882. J. Benedict *vs.* The Antietam Paper Co. Precipe for judgment. Filed Sept. 5, 1882. Cohen.

Appearance of W. Macrum.

ALLEGHENY COUNTY, *ss:*

Court of Common Pleas, No. One. June T., 1882.

BENEDICT
vs.
THE ANTIETAM PAPER CO. } 256.

Enter the appearance of W. Macrum, Esq., att'y for def'ts. Sept. 9, 1882.

A. H. CLARKE,
Att'y for Def'ts.

To J. O. Brown, Esq., pro.

Indorsed: No. 256. June term, 1882. Benedict *vs.* The Antietam Paper Co. Precipe for appearance of W. Macrum, Esq. Filed Sept. 9, 1882.

21 *Order Amending Record.*

ALLEGHENY COUNTY, *ss:*

Court of Common Pleas, No. One.

BENEDICT *vs.* ANTIETAM PAPER CO.

SEPT. 9, 1882.

On motion of A. H. Clarke, attorney for def'ts, rule to show cause why the order entered on the 5th inst. should not be rescinded, and the rule *ex parte* defendants granted June 15th, 1882, and made absolute, and the judgment entered on the 5th inst. be stricken off as having been improvidently entered; proceedings stayed *interim*.

By the court.

Indorsed: No. 256. June T., 1882. Benedict *vs.* Antietam Paper Co. Order amending record. Filed Sept. 9, 1882. A. H. Clarke.

Supplemental Affidavit of Defence.

ALLEGHENY COUNTY, *ss:*

Court of Common Pleas, No. One. June Term, 1882.

JOSEPH BENEDICT
vs.
JOHN A. DUSHANE and Others. } 256.

STATE OF MARYLAND,
County of Washington, } *sct:*

22 John W. Stonebraker, one of the defendants in the above case, having been first duly sworn by me, a notary public in and for said county, deposes as follows:

I am advised and believe that defendants are not bound to supplement their affidavit filed May 25, 1882, but by leave of court granted in the order made Sept. 16, 1882, the foregoing facts are stated as a just defence to the whole of plaintiff's claim.

Plaintiff is a rag dealer, having his stock in trade in the city of Pittsburgh. In February, 1882, he came to see defendants at Hagerstown, Md., and solicited an order for rags and paper. On behalf of defendant firm I gave him an order for substantially the quantities and kinds described in the exhibit attached to his affidavit. Nicely-assorted print and book rags were designated as the subject-matter of said contract, but no rags were accepted, inspected, or even seen by defendants or any one acting for them. The rags which the plaintiff shipped from Pittsburgh, professedly in fulfilment of said contract, were packed in bails, and their character could not be discovered until the bails were unpacked. After some of them had been unpacked and used nine of defendants' sorters were stricken with smallpox and varioloid, and the desease spread rapidly among the employees and those living near the mill, causing the
23 death of five persons and preventing many others from working. Others became alarmed. When the reports of the epidemic spread customers refused to buy defendants' paper. They were unable to hire workmen at the usual rates, and some refused to work on any terms. By reason of the premises and of the interruption of defendants' business occasioned thereby, money paid for the support of those disabled by said disease, injury to defendants' said business, &c., defendants suffered loss and were put to expense far exceeding the amount of plaintiff's bill.

The said rags were infected with smallpox before plaintiff shipped them. I am informed and believe, and expect to prove, that he well knew them to be infected before he shipped them. If defendants had known them to be infected they would have refused to receive them. The rags they contracted for and were to receive, according to the clear understanding between them and plaintiff, were good merchantable rags, free from infection. The infection conveyed in said rags was the sole cause of the breaking out of said desease in the manner above described, and they were shipped by plaintiff with intent to deceive, cheat, and defraud the said defendants.

As soon as practicable after the discovery of said infection, defendants wrote to plaintiff, stating the facts and telling him that all the rags not consumed before said discovery was made were held subject to his order, and they were all still so held until defend-
24 ants' foreman, being compelled to remove the said rags, and mistaking defendants' orders to the contrary, turned them into the rotary bailer without sorting them for the purpose of getting rid of the risk of infection attendant upon their remaining in the mill.

For the rags so used it is submitted that defendants ought not to pay the prices charged by plaintiff, but such amount only as they were reasonably worth, if they were worth anything.

Defendants will ask for a certificate for the amount of damages in excess of the true amount to which plaintiff may be entitled.

"Alterations and interlineations made before signature and affidavit."

JOHN W. STONEBRAKER.

Sworn to and subscribed before me this 30th day of September, 1882. In testimony whereof I have hereunto set my hand and affixed my notarial seal.

JOS. KAUSLER, [SEAL.]
Notary Public.

It is agreed that the foregoing affidavit be filed as it stands with the following interlineations and erasures, viz: those which
25 are marked in the margin with the figures 1 to 13, inclusive. The plaintiff's counsel waives the right to have the affidavit drafted anew and resworn, and agrees not to take any advantage of the said erasures and interlineations before the court or before the jury.

Oct. 13, 1882.

J. COHEN,
Att'y for Pl'ff.

ALLEGHENY COUNTY, *ss:*

W. Macrum, being first duly sworn, says that he is agent in this behalf of defendant, and that the facts stated in the within affidavit, as altered by the interlineations and erasures marked one to 13 inclusively, are true, as he is informed and believes, and expects to be able to prove at the trial.

The said erasures and interlineations were made by affiant after the receipt of letter from defendants explaining and correcting a mistake in said affidavit as originally drawn, and the counsel for plaintiff having dispensed with the redrafting and reswearing of the same.

W. MACRUM.

Sworn and subscribed this 14th day of October, 1882.

J. O. BROWN, *Pro.*

Indorsed: No. 256. June term, 1882. Benedict *vs.* Antietam Paper Co. Supplemental affidavit of defence. Filed Oct. 14, 1882. A. H. Clark, W. Macrum.

26 *Plea.*

ALLEGHENY COUNTY, *ss:*

Court of Common Pleas, No. One.

BENEDICT *vs.* ANTIETAM PAPER CO.

Nov. 28, '82.

Def'ts plead payment with leave, &c., and the special matter stated in affidavits of defence, and they claim damages upon the cause of action stated in said affidavits in the sum of seven thousand dollars in excess of the amount sued for by plaintiff.

A. H. CLARKE,
W. MACRUM.
Att'ys for Def'ts.

Indorsed: No. 256. June term, 1882. Benedict *vs.* Antietam Paper Co. Filed Nov'r 28, 1882. A. H. Clarke. W. Macrum.

Counter-Affidavit of Claim.

ALLEGHENY COUNTY, *ss:*

Court of Common Pleas, No. One. June Term, 1882.

JOSEPH BENEDICT
vs.
JNO. A. DUSHANE *et al.* } No. 256.

27 Joseph Benedict, the above plaintiff, being duly sworn, says that it is not true, as alleged in defendants' affidavit, filed herein, that the rags in this case sued for were infected with small-pox before plaintiff shipped them, and that he well knew it. Affiant avers that said rags were not affected as alleged, and that rags of the same kind, and obtained from same source as those sold to defendants, were sold to other parties in Pittsburgh and elsewhere, from none of whom any complaint or charge of infection has ever been received or heard, nor was there ever expressed by them any dissatisfaction with the quality of such rags.

Affiant denies that any contract was ever made by affiant with defendants; that said rags should be free from infection, but, to the contrary, the subject of infection was never mentioned or spoken of by plaintiff or defendants at time said goods were purchased.

Affiant denies that the infection alleged to have been contained in said rags was the cause of the breaking out of said disease, as alleged by def'ts, and affiant expressly denies that he had any knowledge or indication of any infection in said rags by def'ts alleged to have been contained therein, or that he shipped those rags to def'ts with any intent of deceiving, cheating, or defrauding them;

28 that def'ts did write to plaintiff stating that said rags were being held subject to pl'ff's order, to which plaintiff replied requesting them to be shipped to C. P. Markle & Sons, which was never done by them, nor were they ever returned to pl'ff. Affiant

further denies that defendants suffered any loss consequent upon the infection of said rags.

All to the best of affiant's knowledge, information, and belief, and all of which affiant expects to be enabled to prove on the trial of this case.

JOSEPH BENEDICT.

Sworn to and subscribed before me this 31st Oct., 1882.
[SEAL.] JOSIAH COHEN,
Notary Public.

Indorsed: No. 256. June term, 1882. Joseph Benedict *vs.* Antietam Paper Co. Counter-aff. of claim. Filed Nov'r 29, 1882. Cohen.

29 *Petition for Removal and Bond.*

ALLEGHENY COUNTY, *ss:*

In the Court of Common Pleas, No. One, of Allegheny Co. June T., 1882.

JOSEPH BENEDICT
vs.
THE ANTIETAM PAPER CO. } No. 256.

To the hon. judges of said court:

The petition of John W. Stonebraker and J. A. Dushane, partners as the Antietam Paper Co. and defendants in the above
30 action, respectfully represents:

1. That your petitioners are both citizens of the State of Maryland, and the plaintiff in said action is a citizen of the State of Pennsylvania, and the citizenship of said parties was the same as at present when said action was instituted.

2. That the amount in controversy in said suit exceeds the sum of five hundred dollars.

3. That the bond of your petitioners, with Charles S. Frisbee and John S. McCullough as sureties, conditioned according to the requirements of the act of Congress on this subject, is annexed to this petition.

4. Your petitioners therefore pray that this honorable court proceed no further in said action than to receive and approve said bond and permit the filing of this petition for the removal of said action into the circuit court of the United States for the western dist. of Penna.

And as in duty bound your petitioners will ever pray, &c.

JOHN W. STONEBRAKER AND
J. A. DUSHANE,
By A. H. CLARKE AND W. MACRUM,
Their Attorneys.

STATE OF PENNSYLVANIA, } *sct:*
County of Allegheny, }

Wm. Macrum, agent in this behalf of above-named petitioners, being duly sworn, says that the facts stated in the foregoing petition are true to the best of his knowledge and belief.

31

W. MACRUM.

Sworn & subscribed before me this 5th day of March, 1883.

J. O. BROWN, *Pro.*

Know all men by these presents that we, Jno. A. Stonebraker, J. A. Dushane (both of the State of Maryland), and Chas. S. Frisbee and John S. McCullough, both of Allegheny Co., Pa., are held and firmly bound unto Joseph Benedict, for his own use and the use of whomsoever it may concern, in the penal sum of two hundred and fifty dollars, to be paid to the said Joseph Benedict, his executors, administrators, certain attorney, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Witness our hands and seals this — day of March, A. D. 1883.

The condition of this obligation is such that whereas the said Stonebraker and Dushane have filed a petition in the court of common pleas, No. 1, of Allegheny county, Penna., for the removal of an action there depending (at No. 256, June term, 1882), in which Jos. Benedict, the above-named obligee, is pl'ff and they are the def'ts:

Now, if the said defendants shall file in the circuit court of the United States for the western district of Pennsylvania, within the time prescribed by the act of Congress in such case, a copy of the record of said action, and shall pay all costs that may be awarded by said circuit court if said circuit court hold that said suit was wrongfully or improperly removed thereto, then this obligation to be void; otherwise, to be in full force.

32

JOHN W. STONEBRAKER, [SEAL.]
J. A. DUSHANE, [SEAL.]
By their att'y, W. MACRUM. [SEAL.]
CHARLES S. FRISBEE. [SEAL.]
JOHN S. McCULLOUGH. [SEAL.]

ALLEGHENY COUNTY, *sct:*

Charles S. Frisbee and Jno. S. McCullough, sureties in the within bond, being duly sworn, says that they are severally worth the amount of the penalty thereof over and above their respective debts and liabilities.

CHAS. S. FRISBEE.
JOHN S. McCULLOUGH.

Sworn and subscribed before me this 5th day of March, A. D. 1883.

J. O. BROWN, *Pro.*

Indorsed: No. 256. June term, 1882. Joseph Benedict vs. Antietam Paper Co. Filed March 7, 1883.

Petition for Removal and Bond.

And now, M'ch 8, 1883, petition presented and ordered to be filed and bond approved.

By the court.

A. H. CLARKE.
MACRUM.

33 *Minutes of Trial.*

In the Circuit Court of the United States for the Western District of Pennsylvania. May Term, 1883.

JOSEPH BENEDICT
vs.
JOHN A. DUSHANE and JOHN W. STONEBRAKER, Partners as the Antietam Paper Co. } No. 45.

MAY 15, 1883.

The parties to the above case being at issue a jury was called, who came, viz: A. T. Moorhead, Jr., A. B. Stewart, Jacob Soudor, L. W. Savage, Bruce Southworth, John Walker, H. B. McKean, J. Weyand, Lewis Etter, S. S. Gehr, Simon B. Minimum, and P. S. Squires, twelve good and lawful men, who being duly sworn and being in the box, counsel for the respective parties opens their case and offers evidence; and, after the charge by the court to the jury, they return a verdict for the plaintiff for the sum of eight hundred and sixty-six and $\frac{31}{100}$ ($866.31) dollars on May 16, 1883.

H. D. GAMBLE, *Clerk*.

34 *Motion, with Reasons for a New Trial.*

In the Circuit Court of the United States for the Western District of Pennsylvania. May Term, 1883.

BENEDICT
vs.
STONEBRAKER and Another. } No. 45.

MAY 17, 1883.

Counsel for defendants move the court to grant a new trial in this case for the reasons subjoined:

Reasons.

1. It is submitted that the court erred in treating these defendants' counter-claim as a claim of set-off for a mere breach of contract, and in disregarding (during the whole course of the trial, and in overruling def'ts offers of evidence) the claim made in the affidavits of defendants, and also made by their counsel in claiming the right to begin, &c., and afterwards in opening the case to the jury, which claim was that the counter demand was in substance an action of tort for fraudulently selling and inducing defendants to receive into their mill rags infected with smallpox, well knowing that they were so infected, and thereby causing damages of large (but unliquidated) amount to defendants.

2. The court erred, it is respectfully submitted, in directing a verdict for pl'ff after he had demurred to evidence adduced by def'ts tending to prove that these rags were packed under the personal su-
35 pervision of pl'ff; that he held them in stock for a whole year, during which the market price advanced, and then, after offering them to 12 dealers successively, sold them to def'ts for a low price; that at the time he alleges that he packed or baled these rags, and also at and before the time when he sold them, smallpox was epidemic in the cities where they were all collected to his knowledge, and that said desease was especially prevalent in the districts where he bought his rags; that he represented these rags to be "clean, nicely assorted print and book rags," and of his own packing, but that, when opened, the bales emitted an overpowering and sickening odor; were filthy, and contained sulphur, carbolic acid, or other foreign substances commonly employed as disinfectants; that ten days after the first opening of the bales several assorters in said mill were simultaneously stricken with smallpox; that said desease spread among said employees and occasioned a partial suspension of the operations of said mill, loss of customers selling country rags, and customers buying the product of said mill, expense to defendants in maintaining disabled employees, and extra outlay to induce them to remain or return, and other great wrongs, for which defendants sought redress by way of vindictive damages.

36 3rd. The court erred in excluding evidence to support defendants' claim for speculative, remote, and vindicatory damages.

Respectfully submitted,

A. H. CLARKE,
W. MACRUM,
Of Counsel for Defendants.

Indorsed: No. 45. May term, 1883. Benedict *vs.* Stonebraker and another. Motion and reasons for new trial *ex parte* def'ts. Filed May 17th, 1883. Clarke, Macrum.

And now, May 23d, 1883, upon consideration the motion for a new trial is overruled.

By the court.

MAY 23RD, 1883.

Judgment upon the verdict.

H. D. GAMBLE, *Clk.*

37 *Judgment. Docket Entry.*

No.: 45.
Term: May.
Year: 1883.
Defendants: Antietam Paper Company, John A. Dushane, [and] John W. Stonebraker.
Plaintiff: Joseph Benedict.
Date: May 23, 1883.
Am't: $866.31.
Int. from May 16, 1883.
Att'y for pl'ff: Josiah Cohen.

38 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the United States circuit court for the western district of Pennsylvania, Greeting:

Because in the record and proceedings as also in the rendition of the judgment of a plea which is in the said circuit court before you, between Joseph Benedict, a citizen of the State of Pennsylvania, plaintiff, and John A. Dushane and John W. Stonebraker, citizens of the State of Maryland, defendants, a manifest error hath happened, to the great damage of the said defendants, as by their complaint appears, we, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the 2d Monday of October next in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this 30th day of July, A. D. 1883.

Allowed by—

M. W. ACHESON,
U. S. Judge.

[Endorsed]: Filed July 30, 1883. H. D. Gamble, c'k.

39 *Defendants' Bill of Exceptions.*

In the Circuit Court of the United States for the Western District of Pennsylvania. May Term, 1883.

JOSEPH BENEDICT
vs.
ANTIETAM PAPER CO. } No. 45.

Be it remembered that as this case, which was an action for the price, viz., $813.03, for goods, to wit, 65 bales of rags, sold and delivered by the plaintiff to the defendants, the plaintiff's declaration being in the common counts in assumpsit (and which case was brought in the court of common pleas, number one, of Allegheny county, Pennsylvania, but was removed into this court by the defendants), came on for trial in this court before the Hon. M. W. Acheson, presiding, upon the defendants' plea, in the words following:

Plea.

November 28, 1882, defendants plead payment with leave, etc.,

and the special matter stated in the affidavits of defense, and they claim damages for the cause of action stated in said affidavits in the sum of $7,000 in excess of the amount sued for by plaintiff.

(Signed) A. H. CLARKE,
W. MACRUM,
Att'ys for Defendants.

40 The said affidavits of defense being as follows:

Original Affidavit of Defense.

ALLEGHENY COUNTY, *ss:*

In the Court of Common Pleas, No. 1, Allegheny Co., Pennsylvania. June T., 1882.

JOSEPH BENEDICT
vs.
JNO. A. DUSHANE and JNO. W. STONEBRAKER, Partners as the Antietam Paper Co. } No. 256.

Personally appeared John W. Stonebraker, who, being duly sworn according to law, on oath says that defendants have a just and legal defense to the whole of plaintiff's demand, the nature and character of which is this: That the rags sent from plaintiff to defendants' mill, at Hagerstown, Md., on or about the 7th day of Febauary, 1882 (the value of which being plaintiff's foundation for this suit), were infected with smallpox, as deponent is informed and believes, and expects to be able to prove, the disease smallpox being epidemic at the city of Pittsburgh and Allegheny City at and prior to the date of shipment.

Deponent further says that in about 10 days after the receipt of the rags at the mill and the handling and assorting of some
41 of them smallpox and varioloid attacked several of the men so employed, and then spread to the town of Hagerstown, many cases having proved fatal. Deponent at once notified plaintiff that the rags had introduced smallpox into the community where the mill is located and that several of defendants' employees were attacked, and that the rags were at his, plaintiff's, disposal, and plaintiff ordered them shipped to C. P. Markle & Son, but that this was impossible, as the board of health of Hagerstown would not permit their removal through the streets.

Deponent further says that he is informed by those who were engaged in assorting these rags that they gave evidence of attempts being made to disinfect them, and that he expects to be able to prove that the breaking out and prevalence of smallpox at defendants' mill was wholly owing to the rags, which conveyed it from Pittsburgh, the place from which they were gathered and shipped.

Deponent further says that these rags have caused and are still causing defendants great loss and damage, and their presence in the mill, where a greater portion of them still remains, — a terror and fright to all in the neighborhood.

Deponent further says that prior to the receipt and opening of

the bags of rags there was no smallpox anywhere near the mill or Hagerstown, and he is informed and believes, and expects to
42 be able to prove, that its appearance can be traced immediately to the rags shipped by plaintiff.

And deponent further says that by reason of the facts above stated defendants are not indebted to plaintiff in the amount claimed, if in any sum, and that part of the rags are still at the said paper mill, subject to the disposal of plaintiff.

And further deponent says that he verily believes and has reason to know that the breaking out of the said disease at his said mill has caused, in the expenditure of money, stoppage in work, and hurt and injury to the defendants' business, a pecuniary loss of the amount of plaintiff's claim.

And further deponent saith not.

J. W. STONEBRAKER.

STATE OF MARYLAND, *Washington County*, } *To wit:*

I hereby certify that on this 22nd day of May, 1882, before me, the subscriber, a notary public of the State aforesaid, in the county aforesaid, personally appeared John W. Stonebraker (personally known to me be the person so named) and made oath in due form of law that the matters and things stated in the foregoing affidavit are true and *bona fide*, as therein set forth, to the best of his knowledge and belief, and I further certify that the said John W. Stone-
43 braker at the same time subscribed his name to the said affidavit.

In testimony whereof I have hereunto set my hand and affixed my notarial seal, the day and date above written.

JOSEPH KAUSLER, [N. P. SEAL.]
Notary Public.

Supplemental Affidavit of Defense.

ALLEGHENY COUNTY, *ss:*

Court of Common Pleas, No. 1. June Term, 1882.

JOSEPH BENEDICT
vs.
JOHN A. DUSHANE and Others. } 256.

STATE OF MARYLAND, *County of Washington*, } *sct:*

John W. Stonebraker, one of the defendants in the above case, having been first duly sworn by me, a notary public in and for said county, deposes as follows: I am advised and believe that defendants are not bound to supplement their affidavit filed May 25, 1882, but by leave of court granted in the order made Sept. 16th, 1882, the following facts are stated as a just defense to the whole of plaintiff's claim. Plaintiff is a rag-dealer, having his stock in trade in the city of Pittsburgh. In February, 1882, he came

to see defendants at Hagerstown, Md., and solicited an
44 order for rags and paper. On behalf of defendant firm I gave him an order for substantially the quantities and kinds described in the exhibit attached to his affidavit. Nicely assorted print and book rags were designated as the subject-matter of said contract, but no rags were accepted, inspected, or even seen by defendants or any one acting for them. The rags which the plaintiff shipped from Pittsburgh, professedly in fulfilment of said contract, were packed in bales, and their character could not be discovered until the bales were unpacked. After some of them had been unpacked and used nine of defendants' sorters were stricken with smallpox and varioloid, and the disease spread rapidly among the employees and those living near the mill, causing the death of five persons and preventing many others from working; others became alarmed when the reports of the epidemic spread; customers refused to buy defendants' paper; they were unable to hire workmen at the usual rates and some refused to work on any terms. By reason of the premises and of the interruption of defendants' business occasioned thereby, money paid for the support of those disabled by said disease, injury to defendants' said business, etc., defendants suffered loss and
45 were put to expense far exceeding plaintiff's bill. The said rags were infected with smallpox before plaintiff shipped them. I am informed and believe, and expect to prove, that he well knew them to be infected before he shipped them. If defendants had known them to have been infected they would have refused to receive them. The rags they contracted for and were to receive, according to the clear understanding between them and plaintiff, were good, merchantable rags, free from infection. The infection conveyed in said rags was the sole cause of the breaking out of said disease in the manner above described, and they were shipped by plaintiff with intent to deceive, cheat, and defraud the said defendants. As soon as practicable, after the discovery of said infection, defendants wrote to plaintiff stating the facts and telling him that all the rags not consumed before said discovery was made were held subject to his order, and they were all still so held until defendants' foreman being compelled to remove the said rags, and mistaking defendants' orders to the contrary, turned them into the rotary boiler without sorting them for the purpose of getting rid of the risk of infection attendant upon their remaining in the mill.

For the rags so used it is submitted that defendants ought not to pay the price charged by plaintiff, but such amount only as
46 they were reasonably worth, if they were worth anything. Defendants will ask for a certificate for the amount of damages in excess of the true amount to which plaintiff may be entitled.

"Alterations and interlineations made before signature and affidavit."

JOHN W. STONEBRAKER.

Sworn to and subscribed before me this 30th day of September, 1882.

In testimony whereof I have hereunto set my hand and affixed my notarial seal.

JOSEPH KAUSLER, [N. P. SEAL.]
Notary Public.

And the jury having been duly empanelled and sworn to sustain the issue on their part defendants adduced the evidence following:

47 Joseph Benedict, the plaintiff, being called by the defendants (as for cross-examination), and being duly sworn, testified that the rags shipped by him to defendants were collected in Allegheny City, Pittsburgh, and the country roundabout; that he was accustomed to buy rags from Moritz Streng, Ignatz Uttenweiler, H. J. Diehl, B. Hirch, and occasionally from Jno. Wirth, etc.; that these dealers did business in the 3rd and 7th wards, Allegheny City. Being asked to name other dealers from whom he had bought, he said there might be others; he was unable to name them, for he bought rags from all or any parties who offered him merchantable rags, not knowing where they were collected. He further testified that the rags in question were assorted in his establishment, and were baled under his special instructions, and that his foreman was present to tell how it was done. Being asked whether smallpox was not epidemic in the cities of Pittsburgh and Allegheny at and before the time these rags were shipped, and whether he did not know the fact at that time, he answered affirmatively; but he testified that said rags had been baled a year or more before they were shipped to defendants, and had lain meantime in a store-house he had on Water street, Pittsburgh, apart from his place of business on Wylie street. Witness stated that he had been engaged in the business of dealing in rags in Pittsburgh for about twenty years. He testified that immediately before going to Hagerstown and offering
48 these rags to defendants he had offered the same rags to twelve different firms in the city of Philadelphia, adding that he had actually sold rags to one of these Philidelphia firms.

On further examination he said that the rags sold to the Philadelphia house were not taken from the warehouse where, as he tesfied, the rags shipped to defendants were stored. On being asked to whom he had sold from this warehouse, besides the defendants, he named C. P. Markle & Son. Being asked whether he offered these rags to defendants as clean, nicely assorted print and book rags, he said: "I think the word 'clean' was not used."

Q. So you thought you were entitled to send filthy ones?

Objected to.

A. To the best of my knowledge and belief they were clean.

Being asked whether there was sulphur, carbolic acid, or other disinfectant in the bales shipped to defendants, he answered: "Mr. Macrum, to the best of my knowledge and belief there was nothing like that in them," and added that he never used disinfectants.

Witness further stated that in offering these rags to Mr. Stonebraker (one of defendants) he did tell him he was selling the rags for less than he had paid for them. On further examination he

said: "That was not true—business men say those things." In answer to a question by his own counsel plaintiff testified
49 that he had no knowledge whatsoever of the rags being infected with smallpox or any other disease, and that he had no knowledge whatsoever of the use of sulphur, carbolic acid, or other disinfectant in his establishment.

Jno. W. Stonebraker, one of the defendants, testified that they had only had one transaction with plaintiff before this purchase, and that was by letter; that plaintiff came in person to Hagerstown, where defendants' mill is, to offer them these rags; that Mr. Stonebraker told him they did not need rags, but wanted shavings and solid papers; that plaintiff stated that the rags he offered were very nice and clean and were of his own packing; that Mr. Stonebraker, having asked his prices and found that they were one-fourth of a cent per pound less "all around" than defendants were paying for stock, gave an order for a couple of car-loads of clean, nicely assorted print and book rags as a sample lot; that at the same time an order was given for the paper shavings and solid papers which defendants were desirous of having, and that plaintiff's promise to procure the latter, together with the low price at which the rags were offered, was what induced the witness to deal with him. This witness further testified that the rags were delivered at defend-
50 ants' mill about February 12th, 1882; that they were in bales with good baling around them; that immediately upon the arrival of the rags sixteen bales were put into the rag-room for inspection, that being the quantity which can be handled to the best advantage at one time, and the remainder of the two car-loads were stored away in a store-house; that the morning when these sixteen bales were assorted witness walked through the room and, observing that they were very filthy and emitted a sickening stench, remarked that defendants would take no more rags from Mr. Benedict; that said rags were not what Mr. Benedict represented them to be; that about ten days after this Dr. Boyle reported to witness that there was no room to doubt that there was smallpox in the mill, and told him of three assorters who had it; that witness, being ignorant of the prevalence of smallpox in Pittsburgh and Allegheny, was at first incredulous, but, upon making inquiry among the employees, became satisfied not only that the disease had been introduced into the mill, but that these rags shipped by plaintiff had been the means of introducing it. Thereupon witness wrote to Benedict the letter marked "Exhibit No. One," and embodied in this bill "*infra*." His reply (Exhibit "B" *infra*) directs the shipment of the portion of the consignment known as "colors" to C. P. Markle & Son,
51 and the return of the portion known as "blues" to the plaintiff. The defendant rejoined (Exhibit — *infra*), showing why they could not then ship any rags and declining to ship any of them to Markle's, even when able, unless assured of Markle's consent to take rags supposed to be infected with smallpox. The witness testifies that to this letter defendants never received any answer, and that they never heard again from plaintiff until they got notice of this attachment from the garnishees.

At the time they were receiving no rags, except from Norfolk and the country surrounding the mill; there was no smallpox there.

Charles B. Boyle deposed that he was a physician, practising at Hagerstown; that in the month of February, 1882, there was
52 smallpox in the vicinity of defendants' said mill.

Being asked when the disease first broke out, he said that the first visit he made was February 25, 1882, to the houses of Daniel Garlock, Mrs. Charles Barber, Mrs. Keyser, and Mrs. Negley, residents of a small settlement in the immediate vicinity of the mill; that Mrs. Garlock, Mrs. Barber, Mrs. Keyser, and Mrs. Negley, the first victims of the disease, were all employees of defendants; that during the prevalence of the disease in the vicinity at that time he attended thirty-nine (39) cases, thirty-three (33) of which were those of employees or of members of employees' families; that there were six (6) deaths from the disease; that witness attributes the outbreak of the disease to paper-mill contagion, his reason being that there was no other smallpox in that locality and the first cases were all employees; that there had been no cases of smallpox for nine (9) years prior to February 25, 1882, in Hagerstown or vicinity.

To a cross-interrogatory, as to whether he undertook to swear that no other cause produced the disease but the importation of these rags, he said, "I don't know; I don't pretend to say anything, but that the first cases came from the paper mill."

Mrs. Elizabeth Keyser testified that she was sixty-five (65)
53 years of age and resided at Fiddlersburg; that she was a rag-picker at defendants' mill in February, 1882; that the portion of those rags which she saw assorted at the mill were very dirty and very offensive, smelled badly, which was not the case with the other rags we had picked; that there were no cases of smallpox in that vicinity until after these rags were assorted; that it first broke out ten (10) or fifteen (15) days after; that the first cases were Mrs. Barber, Mrs. Negley, Mrs. Garlock, Mrs. Clewes, and myself; that all of these were rag-pickers of defendants' mill; that there were six (6) deaths in the vicinity; that witness had a very severe attack of small-pox and had not been able to work at the mill since; that during her sickness the provisions she used were furnished by defendants without cost to her; that there were other rags in the mill not purchased from plaintiff at the time his rags arrived.

Lulu Cramer testified that she was fifteen (15) years old and helped her mother to assort some of these rags at defendants' mill; that they smelled very strong of sulphur; made her sick so that she went and sat down; that they smelled differently from rags
54 they had been accustomed to handle; that she was taken with the smallpox about the last of February—also her mother; that they were not able to work for five (5) or six (6) weeks; that she never heard of any smallpox there until they took sick; that she saw nothing besides rags in the bales, except whole pantaloons and shirts which she thought too good to be thrown away.

Mrs. Missouri Garlock, eighteen years old, deposed that several bales were cut and assorted and put into the boiler; that under the stand where they were assorted, when she went to sweep up, she found what looked like sulphur on the floor; the smell of the rags made her sick; she tied a white cloth over Mrs. Barber's nose and mouth to keep her from smelling; saw half a quilt and several overalls, which were very filthy and smelled badly; quilt had blood stains upon it; the bales were all put up, and nothing could be seen until they were cut open; witness took sick February 24, 1882; four other assorters the same day and one the next; it spread from one end of Fiddlersburg to the other; all the first cases employees at the mill; that she (the witness) thought there was apparently an effort to disinfect the bales with sulphur and what she thought
55 carbolic acid; that her family were supplied with necessaries by defendants while she was sick, for which they paid defendants nothing; there were never any rags she had anything to do with that were so filthy as these; some of the assorters objected to handling them when first opened, because they said they were afraid of smallpox.

On cross-examination she stated that there were other rags at the mill, how many she was unable to say, as every day there were rags coming; they were Norfolk rags and rags gathered in the neighborhood.

Miss Kate Saylor deposed that she assorted one bale and part of the second; those she assorted were old pantaloons, coats, and men's wear, and had a very disagreeable smell; the second bale — so offensive that she could not finish it; that they "had an awful smell," and made her sick while she was assorting them, and all who had smallpox handled these rags; that she was taken with varioloid February 23rd, 1882; that there were three (3) deaths in one family, seven (7) deaths in all.

Cross-examined:

Some Norfolk rags assorted at the same time.

James H. Jackson deposed that he was general foreman at
56 Antietam (defendants') mill from February, 1882, to October, 1882; rags delivered by plaintiff at said mill were all dark-colored and very filthy; witness first saw them February 10th, 1882; sixteen bales were put at once from wagon into assorting-room; remainder of bales in stock-house, sixty (60) yards from mill; a very sickening stench arose from those assorted; they were very filthy; something in the smell that would make the assorters sneeze and feel sick; had to leave their table and go out to fresh air to recover from the sickening sensations. Asked what else was found in the bales besides rags, he answered, "whole garments were found in — bales, too good to be classed as rags, and more dirt than we usually find in rags brought to the mill; don't know how many were sick; there were those who were not sick, became frightened, and remained

away from — mill; the other rags assorted at that time were clean and sweet in comparison with the Pittsburgh rags.

The defendants' counsel offering to read from the deposition of Mrs. Missouri Garlock the following answer to "interrogatory 8th," which inquired as to the cause of the breaking out of smallpox in that vicinity:

["I believe it came from the Pittsburgh rags; they smelled badly and made me very sick, and, seeing what I believed to be sulphur in these rags, I think they were the cause of my taking the smallpox."]

57 "I never in my experience saw rags as filthy as these were."

The plaintiff's counsel objected that the belief of the witness, being a mere opinion, is not evidence, and objected to so much of the said answer as relates to the witness' belief, and is enclosed in brackets, which objection the court sustained, and upon exception seals this bill at the instance of defendants.

M. W. ACHESON.

The said deponent Jackson being asked whether anything prevented the return of the rags to plaintiff, and whether any of them were used or disposed of without being assorted or unbaled; if so, under what circumstances, by whose orders, whether with knowledge of defendants; what their orders were (if any) as to these rags, and whether they were carried out; if not, why and when did they first learn that their orders were not obeyed; to whom were they given, and who was responsible for their enforcement, made answer as follows: "The corporate authorities of Hagerstown refused to allow rags to be hauled to or from the depot. I, on my own responsibility, without the knowledge of Mr. Stonebraker (as Mr. Stonebraker gave orders that no more than the sixteen (16) bales should be brought into the mill), for the safety of the

58 community, took those rags without having them assorted and dumped them into the rotary boiler, and boiled them with lime and soda ash for twelve hours with high-pressure steam, as I felt by this means I should destroy all possibility of infection. I saw boys playing about the stock-house and on these bales, and in order to prevent the spread of the smallpox I thought it was absolutely necessary that these rags should be got out of the way. I did not put them into the rotary boiler until from two (2) to three (3) months after smallpox had broken out. I can't tell the exact time when Mr. Stonebraker learned that they had been used, but he was very much surprised when he did find it out. I was the party to whom the instructions were given, and I am the party who was responsible —I disobeyed the order for the above reason." He further testified: "We were constantly receiving rags from Norfolk, Va., and from the country around. I am unable to say where all the rags came from that were being assorted."

Samuel E. Craley, aged forty-one (41), — "ran the cutter," observed that rags delivered by plaintiff under contract, said to be

59 Pittsburgh rags, were very dark-colored and very filthy; cut those that were assorted; smelled very much of brimstone; found some very good pants and vests, too good to be classed as rags; they were well baled and nothing could be seen until — bales were cut; as rags passed through — cutter I noticed that some had blood stains on them; I picked them up and saw blood stains; I cut a lot of the Pittsburgh rags without assorting; as three (3) of my daughters were assorters I volunteered to feed them without being assorted, as I feared their taking the smallpox, and I took the risk to save them; I got the bales from the foreman; when I cut those which were not assorted I saw a quilt which had a very sickening smell.

Mrs. Lydia Cramer deposed that she assorted some of the rags; found clothing too good to be sold as rags—pants and men's underwear; my daughter brought two pairs of ladies' hose home found in these rags.

60 Michael Fouke deposed that he was sixty-eight (68) years old; foreman of rag-room; sixteen (16) bales of these rags — assorted from — 10th to — 17th February, 1882; very dark colors, very filthy, very bad and sickening odor, so much so that he had to go out and get fresh air; saw clothing too good to be sold as rags. Some time after smallpox had broken out the rags were used at the instance of the foreman. Mr. Stonebraker had told me no more should be used; do not know why orders were not obeyed; usually given to foreman of mill; foreman of mill was responsible. It was some time after the rags were used that Mr. Stonebraker learned that they were used.

Cross-examined:

There were other rags in the mill; can't say how many or how long they were at — mill, as we were constantly getting rags from Norfolk and the surrounding country. I did examine them, and at the time, having read that smallpox was in Pittsburgh, I remarked that Mr. Stonebraker ought not to buy rags where smallpox —. I have been foreman of the rag-room thirteen (13) years.

To the question "State precisely what other stocks were assorted at the time the rags sued for were assorted" he answered, "Norfolk and country rags."

61 Alice Koonz: Saw five (5) or six (6) pairs of stockings which were good in the half bale she assorted.

J. Frank Fouke, paper-maker, testified that the rags came from the assorters to him; the dust arising from the rags caused him to cough; saw overalls, shirts, and underwear which he thought too good for rags.

Miss Elizabeth M. Craley assorted two and one-half bales; they smelled badly; gave me headache and very sore throat; found a pair of good stockings and four dresses, three of which were almost

as good as new; also coats, pants, and vests. The rags stunk. There was sulphur in the bale; I also smelled carbolic acid, and found little sacks that smelled like carbolic acid. The Pittsburgh rags that were not assorted were run through the cutter, but I don't know who ordered it to be done. I don't know how many other rags were on hand; there were a couple of Norfolk bales in the room. I was very much frightened.

And upon the question of damages the defendants submitted the following evidence:

62 Mrs. Elizabeth Keyser: "During my sickness the provisions used by me were furnished by the Antietam Paper Company without cost to me."

Cross-examined:

"All I know is that Mr. Stonebraker was in the habit of sending provisions to the sick in my neighborhood."

John W. Stonebraker testified that the defendants furnished, without charge, provisions, coal, and other necessaries to sick hands, and to their families, to the amount of $200; that the mill did not stop, but was short of hands, and that their country supply of rags fell off, parties being afraid to come to the mill on account of the smallpox; that the defendants got rags from Norfolk without having them pass through Hagerstown, which cost them eight (8) cents a hundred pounds more than they had been paying for country rags.

James H. Jackson: "Am general foreman at Antietam Paper Mill. I know that we had a very profitable country trade trading with us, which left us, and thereby making a considerable loss to the mill."

Cross-examined:

"The mill was not stopped, but run short-handed and at
63 a reduced rate of production."

Geo. W. Crum: "The goods that were furnished from the store where I am clerking to those that were down with smallpox were paid for by Mr. Stonebraker. I think the bill he paid was about $125."

Michael Fouke: "I was foreman of rag-room department; don't know the extent of the loss, but know that we lost considerable of our country trade and loss of time in running by reason of being short-handed; I think Mr. Stonebraker furnished provisions, coal, etc., to those that were sick."

Cross-examined:

"I know nothing except the mill was short-handed and there was a loss in production."

James F. Fouke: "I know that coal and provisions were furnished to the families of the sick, as I helped to load up the wagons, and I had orders to take coal from the coal pile."

64 Miss E. M. Craley: "Mr. Stonebraker sent supplies to those who were sick and things that were suitable for the sick, and did everything that he could to make them feel comfortable, and the hands told her that Mr. Stonebraker did not charge them for them."

And the said John W. Stonebraker, one of the defendants, being on the witness stand and testifying on behalf of the defendants, the defendants' counsel proposed to ask him what he estimated the amount of defendants' damages to be.

To which question the plaintiff's counsel objected that it was not competent for the witness to give a lumping estimate of the defendants' damages, but that he should specify the items of damage and testify to facts, his opinion being inadmissible; which objection the court sustained, and thereupon the defendants excepted, and at their instance this bill of exception- is sealed.

M. W. ACHESON.

W. H. Daly, M. D., a medical expert, testified that there could be no more certain mode of spreading smallpox than by means
65 of infected bales of rags, and that the infection might be retained in close bales for a very long time.

C. Hoch, sworn and examined for defendants, testified that he was health officer; that both in the year 1881 and in the year 1882 smallpox was very prevalent in both the cities of Pittsburgh and Allegheny. He testified to the correctness of a tabular statement forming part of his official reports, showing that in the last-named city there were two hundred and twenty (220) new cases reported during the month of December alone, in the year 1881, and five hundred and six (506) cases during the entire year, and that all the cases of 1881 happened in the latter part of that year. He also showed that said disease was almost as widespread in the year 1882 as in the year 1881 throughout said cities, being more severe in the cold months. He also swore that an offensive sickening stench was one of the characteristics of a severe type of smallpox. This was also testified by R. Ackle, a nurse at pest-boat.

66 John Werth, a witness on behalf of the defendants, being upon the stand, the defendants' counsel propose to prove by him that two of his children had taken the smallpox from playing with infected rags, to which offer the plaintiff's cousel objected that the evidence was incompetent and irrelevant, and thereupon the court sustains the objection; to which ruling the defendants excepted, and at their instance a bill is sealed.

M. W. ACHESON.

James Harrison testified that he was a rag dealer and familiar with the mode of conducting that business; that it was not the

practice of American dealers to use disinfectants in packing rags, and that the only kind of rags he had observed disinfectants in were those imported from Europe—"foreign rags."

The copy of plaintiff's book entries given in evidence showed shipments to defendants as follows:

Feb. 7, 1882.	10 bales mixed book stock, 6,871, @ 2⅞	$197	54
	9 bales white shavings, 3,417, @ 3⅞	132	41
	8 bales colors, 3,838, @ 2.20	88	27
	5 bales blues, 2,410, @ 3⅛	75	31
		493	53
67	Less freight	28	11
		$465	42
Feb. 8. 1882.	28 bales colors, 12,882, @ 2.30	$296	29
	5 bales blues, 2,477, @ 3⅛	77	41
		373	70
	Less freight	26	09
		$347	61

The following correspondence was proved and read to the jury by defendants:

(EXHIBIT "A.")

Office of Joseph Benedict, dealer in rags, iron, metal, etc., No. 48 Wylie Ave. P. O. box 799.

PITTSBURGH, PA., *Feb.* 7, 1882.

Antietam Paper Co., Hagerstown.

DEAR SIR: Please find enclosed invoice and B. L. for stock shipped this day, which I had the pleasure of selling to your Mr. Stonebraker. I was enabled to put in some books and shavings as I thought I could send, and bought such at a very small margin, as I know you are anxious to have such; will send balance of colors to-
68 morrow if weather permits. I may not have quite enough blues to-morrow, but will send them then in a few days after that; had no time yet to go to cotton mill, but will attend to it in a few days, and send you a sample of that waste by mail as promised, if they have any on hands. Please examine stock soon and report, especially colors, as I would like to send you a few more car-loads of them.

Yours truly,

JOSEPH BENEDICT.

(EXHIBIT NO. ONE.)

HAGERSTOWN, *Mar.* 6, 1882.

Mr. Benedict.

DEAR SIR: It is proven beyond a doubt that the rags you sent us are full of smallpox. Some eight (8) or (10) ten of our hands are down with it since we handled about this many bales of your rags. From the very fact that you undertook to disinfect the rags with sulphur is pretty good evidence that you knew they were infected.

This is a pretty serious matter. We don't know where it may end. If our mill is stopped it will be a heavy loss to us.
69 The hands refuse to handle any more of your rags and we would not let them if they would. What shall we do with the stock? I would not have it as a gift and double the amount besides.

Yours,

ANTIETAM PAPER COMPANY.

(EXHIBIT "B.")

PITTSBURGH, *March* 8, 1882.

Antietam Paper Co., Hagerstown.

DEAR SIR: Your favor of the 6th inst. to hand and noted. While I deeply deplore that your employés have taken that dreadful disease, smallpox, and although I cannot doubt your word, at the same time I would most emphatically say that I can prove beyond a doubt, and in any court of justice, that in half a dozen to a dozen paper mills to whom I have sold paper stock all along for years not one of the hands took that dreadful disease, and furthermore that dozens of my hands who have been working for me, some of them for the past ten years, not one of them got infected with that disease, smallpox. Furthermore, you have [had] that stock
70 now 30 days, and within that 30 days I offered you twice stock and book stock, and then book stock and shavings, and you never answered, nor did you mention anything about that disease; also did you get book stock and shavings at the same time, and you never mentioned whether you have used that stock or not. The best way I see out of this is what stock you have used you will please pay for and the balance please return.

Your early answer expected.

Yours truly, JOSEPH BENEDICT.

P. S.—If you want to return any stock and books and shavings to Dabler, Mudge and Chapman, Baltimore, colors to C. P. Markle & Son, West Newton, on B. & O. R. R., and blues here to me.

J. B.

PITTSBURGH, *March* 8, 1882.

DEAR SIRS: After writing my letter this morning I met Capt. C. C. Markle, of the firm of C. P. Markle & Sons, and he says that for 25 years they had no case of smallpox in their mill, and for the last

fifteen years I have sold them rags; sold them some colors this morning; sold them some in the last 30 days, and previous
71 to that, and no smallpox; sold to Martin & W. H. Nison blues for the last two years every month, all I made up to this day; have not heard about smallpox. Please make inquiries of those parties, as it will not injure my sales any if you do ask of them.

What have you to say about my rags now?

Yours truly, JOSEPH BENEDICT.

Also James Peters, of this city, and Latrobe, Pa.

(EXHIBIT "C.")

PITTSBURGH, *March* 20, 1882.

Antietam Paper Co. bought of Joseph Benedict, dealer in rags, iron, metal, etc. The highest price paid for woolen rags. No. 48 Wylie ave.

1882.

Feb. 7th.	To m'd'se	465 42
Feb. 8th.	"	347 61
		$813 03

DEAR SIRS: Your favor of the 6th inst. was duly answered on the 8th, and *so* you neither sent the money or returned such rags as you had not used I took the pleasure to-day to draw on you
72 for above amount, three days' sight, which please protest, and oblige,

Yours truly, JOSEPH BENEDICT.

(EXHIBIT "No. 2.")

HAGERSTOWN, *March 21st*, 1882.

Mr. Benedict.

DEAR SIR: Your draft will have to go back. I did not answer your letter because I wanted, in the first place, to get at the bottom of some reports, namely, that the women that assorted some of your rags said they saw the evidence of infected rags, and that sulphur had been used in them. I believe every woman that had a bale of your rags took the smallpox. This much we know positively about it. What the women said comes from the doctor attending them. Of course I have not been to see them, nor do I intend to go to see them, but must wait until they get over it to get at the truth, or at least get their statements direct. If this thing proves as reported you have done us a great injustice, and we don't know where the thing is going to end. It is just all we can do to keep our mill going now, and the disease is still spreading. In the next
73 place, the town council have laid an embargo on us and won't allow any rags to be hauled to or from Hagerstown; so we have to let your stock lie just as it is until this embargo is raised,

and then I don't know whether they will allow this particular lot of rags to go through town, especially if it is positively proven that they are infected with smallpox.

I would not have them to handle, with our men, for half the price of them. If you knew you were sending us such rags you are the last man to complain about your pay. The whole bill of the stock will not pay us the damages we have sustained. We are disposed to wait till we see where the thing is going to end and what developments will be brought out, and, as soon as we will be allowed and the railroad will be allowed to receive your rags, to send them wherever you say, provided you protect us against any damages that may arise in the premises. If these rags carry smallpox to another mill won't that mill have a good claim for damages? I would rather return the rags to you as soon as we may be allowed, and you can send them where you please.

Very truly, ANTIETAM PAPER COMPANY.

74 *Charge of the Court.*

In answer to the inquiry what, under the proofs, the position of the defendants was, the defendants' counsel having stated to the court that the defendants only insisted upon their counter-claim for damages on the cause of action growing out of the infected condition of the rags, the court thereupon charged the jury as follows, to wit:

GENTLEMEN OF THE JURY: This is an action brought by Joseph Benedict, a dealer in rags at Pittsburgh, against John A. Dushane and John W. Stonebraker, doing business at Hagerstown, Maryland, under the firm name of the Antietam Paper Co., to recover the contract price of 60-odd bales of rags sold and delivered by the plaintiff to the defendants. The sale at the price sued for and the delivery of the rags are admitted, and it is shown that the defendants used the whole of them in the manufacture of paper, which they disposed of. The defendants, however, allege, and this is the sole ground of defense insisted on, that the rags were infected with smallpox, and introduced the disease among the defendants' employés, a number of whom took smallpox, and several of whom died of
75 the disease; and the defendants maintain that by reason of such introduction of the disease into their mill they were injured in their business and sustained damages in excess of the plaintiff's claim, and hence that they not only have a full defense to this claim, but are entitled to a certificate for the damages sustained by them in excess of his claim.

The defendants go to the length of charging that the plaintiff knew the rags were infected with smallpox when he shipped them to defendants, and in so doing acted with positive bad faith to the defendants. But it seems to me that the evidence would not justify the jury in so finding, or the court in submitting to the jury, the question of bad faith; nor can I now recall evidence sufficiently showing that the plaintiff was even guilty of culpable negligence in his purchase of these rags.

However, the damages claimed by the defendants, if not in their

nature too remote and speculative, are, it seems to me, altogether uncertain under the evidence. I am of the opinion, and charge you, that the evidence in the case is not such as would enable the jury to ascertain the amount of damages, if any, which the defendants sustained.

76 Upon the whole case the court instructs the jury to find a verdict for the plaintiff for the amount of his claim.

To the following portions of the foregoing charge the defendants' counsel excepted, to wit:

"The defendants go to the length of charging that the plaintiff knew the rags were infected with smallpox when he shipped them to defendants, and in so doing acted with positive bad faith to the defendants. But it seems to me that the evidence would not justify the jury in so finding, or the court in submitting to the jury, the question of bad faith.

"Nor can I now recall evidence sufficiently showing that the plaintiff was even guilty of culpable negligence in his purchase of these rags."

"However, the damages claimed by the defendants (if not in their nature too remote and speculative) are, it seems to me, altogether uncertain under the evidence. I am of the opinion, and charge you, that the evidence in the case is not such as would enable the jury to ascertain the amount of damages, if any, which the defendant sustained."

77 "Upon the whole case the court instructs the jury to find a verdict for the plaintiff for the amount of his claim."

And thereupon, at the defendants' request, the court seals this bill of exception- to the above-quoted portions of the charge.

M. W. ACHESON.

Indorsed: No. 45. May term, 1883. Joseph Benedict *vs.* Antietam Paper Co. Bill of exceptions. Filed July 30, 1883. H. D. Gamble, clerk.

78 In the Circuit Court of the United States for the Western District of Pennsylvania. May Term, 1883.

JOSEPH BENEDICT
vs.
JOHN A. DUSHANE and JOHN W. STONEBRAKER, Partners as the Antietam Paper Company. } No. 45.

WESTERN DISTRICT OF PENNSYLVANIA, *ss:*

I, H. D. Gamble, clerk of the circuit court of the United States for the said district, do hereby certify that the annexed and foregoing pages contain a true copy of the record and proceedings in the above-entitled case, so full and entire as the same remains of record and on file in my office.

In testimony whereof I have hereunto signed my name and affixed the seal of the said court, at Pittsburgh, this 4th day of October, A. D. 1883.

[Seal of the U. S. Circuit Court, W. D. Penna.]

H. D. GAMBLE, *Clerk.*

WESTERN DISTRICT OF PENNSYLVANIA, *ss:*

I, M. W. Acheson, U. S. district judge, presiding in the United States circuit court for said district, do hereby certify that H. D. Gamble above named was, at the time of making the above certificate, and is now, clerk of the said court, and that the said certificate made by him is in due form of law.

M. W. ACHESON,
Presiding as U. S. Circuit Judge.

Pittsburgh, October 4th, 1883.

79 UNITED STATES OF AMERICA, } *sct:*
Western District of Pennsylvania, }

To Joseph Benedict, a citizen of the State of Pennsylvania, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington, D. C., on the 2d Monday of October next, pursuant to a writ of error filed in the clerk's office of the United States circuit court, wherein Jno. A. Dushane & Jno. W. Stonebraker, citizens of the State of Maryland, are plaintiffs in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness my hand this thirtieth day of July, A. D. 1883.

[Seal of the U. S. Circuit Court, W. D. Penna.]

M. W. ACHESON,
Judge of U. S. Circuit Court.
H. D. GAMBLE,
Cl'k U. S. Circuit Court, W. D. of Penna.

80 OCT. 4, 1883.

Served the within citation on Joseph Benedict, at Pittsburgh, Pa., personally, by giving him a true and attested copy thereof and by informing him of the contents.

JAS. S. RUTAN,
Per E. J. SMAIL, *Dep'y.*

Sworn to & subscribed before me this Oct. 3, 1883.
H. D. GAMBLE, *Clerk.*

[Endorsed:] No. ——. Term, 18—. John A. Dushane and John W. Stonebraker *vs.* Joseph Benedict. Citation.

Endorsed on cover: W. Pennsylvania C. C. U. S. No. 345. John A. Dushane and John W. Stonebraker, plaintiffs in error, *vs.* Joseph Benedict. Filed 6th October, 1883.

120-630

FILED
OCT 11 1886
JAMES H. McKENNEY
CLERK

SUPREME COURT

—OF THE—

UNITED STATES.

October Term, 1885.

No. 345.

JOHN A. DUSHANE
and JOHN W. STONEBRAKER,
Plaintiffs in Error,

vs.

JOSEPH BENEDICT.

BRIEF ON BEHALF OF THE PLAINTIFFS IN ERROR.

PITTSBURGH, PA.
PERCY F. SMITH, PRINTER, 55 Virgin Alley.
1886.

SUPREME COURT

—OF THE—

UNITED STATES.

October Term, 1885.

No. 345.

JOHN A. DUSHANE
and JOHN W. STONEBRAKER,
Plaintiffs in Error,

vs.

JOSEPH BENEDICT.

BRIEF ON BEHALF OF THE PLAINTIFFS IN ERROR.

STATEMENT OF THE CASE.

In the court below, this was an action brought by Joseph Benedict, the defendant in error, against the plaintiffs in error, Jno. A. Dushane and Jno. W. Stonebraker, partners under the firm of the Antietam Paper Company, for the contract price of certain rags they had bought of him. They counterclaimed for damage sustained by them in their business from smallpox infection brought into their paper-mill in these rags. The questions debated in the court below and there decided against the plaintiffs in error were:

1. Whether there was evidence from which the jury could legally find that Benedict knew of the infected condition of the rags, or did not take due care in collecting and shipping the rags to defendants.
2. Whether the damages could be recovered in an action.
3. Whether the evidence upon the subject of damages was sufficient to submit to the jury.
4. The competency of certain offers made on behalf of the counterclaimants, to prove the tort and the consequent damage to them in their business.

The Bill of Exceptions shows that early in February, 1882, Joseph Benedict, the defendant in error, a Pittsburgh rag dealer, went to the paper mill of the plaintiffs near Hagerstown, Md., and solicited from them an order for the rags in question, after having offered them unsuccessfully to twelve different houses in Philadelphia, where it was well known that smallpox was epidemic in the cities of Pittsburgh and Allegheny.

Mr. Benedict represented that the rags he would furnish "were very nice and clean, *of his own packing, and would not require reassorting.*" The paper company were ignorant that smallpox was prevalent in Pittsburgh, and Mr. Stonebraker was induced by the representations made by Mr. Benedict, and by the low prices he named, to order "a sample lot of clean, nicely assorted" rags, together with certain paper shavings, &c., of which there was need at the mill, and which Mr. Benedict offered to supply if the company would take the rags.

The prices at which the rags were sold were considerably below the rates then current at Pittsburgh. Mr. Benedict on cross-examination admitted that he assured Mr. Stonebraker he was selling them for less than he had paid for them. He went on to state in his testimony that "that was not true; business men say those things."

The rags were delivered at the mill about February 12, 1882, and sixteen bales of them were immediately distributed among the hands in the assorting room. These sixteen bales were the only portion of the consignment that the company ever attempted to have assorted. Witnesses who had tried to work with them testified that they emitted a stench so sickening and over powering that even these rag-pickers were compelled to desist and seek the open air; that there was blood-stained bed clothing found in them, and many whole garments "as good as new," "too good to be classed as rags," etc.; that the bales contained disinfectants such as sulphur and carbolic acid in little sacks; that the fumes when the bales were opened caused the assorters to sneeze and cough; that about twelve days after these bales were opened, smallpox broke out among those who had worked with the rags, resulting in the death of six persons and the disabling of so many of the employees that the output of the mill was reduced almost to nothing while the disease raged, and until operatives could be induced to re-enter the establishment. It was also in evidence that a sickening odor is characteristic of a severe type of smallpox, and that there was no other source of infection about the mill.

Being asked on cross-examination as to the truth of the representation he had made to Mr. Stonebraker that the rags were of his own packing, Mr. Benedict asseverated "that they were assorted in his establishment and were baled under his special instructions;" also that he was accustomed to buy rags from Moritz Streng, Ignatz Uttenweiler, H. J. Diehl, B. Hirch and John Wirth; that their places of business were in the 3rd and 7th wards, Allegheny—districts where the epidemic was most prevalent. He was unable to name any others from whom he had bought rags, for he bought "from all or any parties who offered him merchantable rags, not knowing where they were collected."

"To the best of his knowledge and belief" there were no disinfectants in these rags. Being asked whether he did not offer them as clean, nicely assorted print and book rags, he said "I think the word clean was not used."

Q. So you thought you were entitled to send filthy ones? A. "To the best of my knowledge and belief they were clean."

He admitted the prevalence of smallpox in the winter of 1882, but asserted that these were part of a stock of rags that had lain a year or upwards in a warehouse distant from his place of business. Thereupon we showed that smallpox was more severe and more prevalent in 1880–81 than in '81–'82; that smallpox infection may be retained in bales of

rags much longer than a year, and that there could be no more certain way of communicating the disease.

We proved also that within the year during which he said this large quantity of rags lay in store, the market price rose very high and declined.

Being pressed to give an account of the disposition made of the remainder of this stock, Mr. Benedict said they had been sold to C. P. Markle & Son, a firm who manufactured only coarse paper without assorting the rags. It was to this firm that he directed the plaintiffs in error to re-ship the rags after he had been apprised of the mischief they had wrought at Hagerstown.

With this story that the rags were a year old, compare Benedict's declaration *ante litem motam* in his letter advising the company of the shipment of some of the rags: "I may not have quite enough blues to-morrow, but will send them then in a few days." Compare also his second letter of March 8, 1882 (Exhibit B): "Sold to Martin & W. H. Nixon blues for the last two years *every month all I made.*

The rags were shipped February 7 and 8, 1882, but did not arrive at the mill until the 12th. There was, of course, the usual period of incubation (twelve days) before the disease declared itself—the first visits of the physician being made February 25. (Record Marg., p. 52.) Mr. Stonebraker, who had charge of the business at Hagerstown, was fully occupied while the pestilence was at its height in caring for the sick and endeavoring to keep the mill in operation as far as possible. On March 6, 1882, he sat down and wrote Mr. Benedict: "It is proven beyond a doubt that the rags you sent us are full of smallpox. "* * * The very fact that you undertook to disinfect the rags with "sulphur is pretty good evidence that you knew they were infected. "This is a pretty serious matter. We don't know where it may end. * * * * What shall we do with the stock?"

To this terse accusation Mr. Benedict "Would most emphati-"cally say that I can prove beyond a doubt, in any court of jus-"tice, that in half a dozen to a dozen paper mills to whom I have sold "paper stock all along for years, not one of the hands took that dread-"ful disease; and furthermore, that dozens of my hands who have "been working for me, some of them for the past ten years, not one of "them got infected with that disease—smallpox."

By a letter of the same date he enforces this defense, as follows: "Captain Markle * * says that for 25 years they had no case of "smallpox in their mill and for the last 15 years I have sold them "rags: sold them some colors this morning; sold them some in the last

"30 days and previous to that, and no small pox; sold to Martin & W. "H. Nixon for the last two years, *every month, all I made.* Up to this "day, have not heard about smallpox. Please make inquiries of those "parties as it will not injure my sales any. What have you to say about "my rags now? Yours truly, JOSEPH BENEDICT.

"Also James Peters, of this city and Latrobe, Pa."

March 20, 1882, Mr. Benedict writes: "Your favor of the 6th was duly answered on the 8th, and as you neither sent the money or returned such rags as you had not used. I took the pleasure to day to draw on you for above amount, &c."

Mr. Stonebraker answered March 21: "Your draft will have to go back. I did not answer your letter because I wanted in the first place to get at the bottom of some reports that the assorters saw evidence of infected rags and that sulphur had been used in them. * * *

It is just all we can do to keep our mill going now and the disease is still spreading. The town council have laid an embargo on us and won't allow any rags to be hauled to or from Hagerstown, so we have to let your stock lie just as it is until this embargo is raised, and then I don't know whether they will allow this particular lot of rags to go through the town." The remainder of this letter asked directions as to the infected rags on hand, and objected to the direction previously given to ship them to Markles' because the railroad company would not be allowed to receive them, and because the Markles had not signified their willingness to take infected rags. To this letter there was no reply. We heard no more from Benedict until we were notified a month afterwards of the foreign attachment with which this action was begun.

The remainder of the infected rags lay in a stock house attached to the mill until some months after the suit was brought, when the foreman, without the knowledge of his employers, and for the purpose of abating what he regarded as a public nuisance, had them run through the cutter, without attempting to assort them, and then boiled them with lime and soda ash for 12 hours in high pressure steam.

Mr. Stonebraker, the manager of the mill, testified that this disaster happened at the season when, owing to the abundant supply of water, the output of the paper-mill should be the greatest; that the mill was not entirely stopped while the pestilence prevailed, but that the production was greatly curtailed; the shortage being upwards of 60,000 lbs. of the finished product; that it cost 8 cents per hundred pounds extra to get rags delivered at the mill; that extra wages had to be paid to operatives; that customers refused to buy paper; that expense was incurred

in attending upon, providing for and curing employees stricken with the disease, and that a very profitable country trade had been lost. The amount of money expended was fixed by the depositions, but as the other items of actual damage could, in the nature of the case, only be approximately estimated, we asked Mr. Stonebraker for such an estimate, but upon objection, the testimony was excluded and an exception sealed. We insisted in the court below, and we respectfully submit here, that this is a proper case for vindictive damages.

Assorters who had handled the rags and had the disease expressed the belief that the rags communicated it. Objection was made that this, being mere opinion, was not evidence, and the court excluded this part of the depositions.

A medical expert having testified that there could be no more certain mode of communicating smallpox than by means of infected bales of rags, we proposed in corroboration of this opinion, to show particular instances in which the infection had been so communicated. Offer overruled; exception.

SPECIFICATION OF ERRORS.

I.—The Court erred in the following portion of the charge, viz:—"The evidence would not justify the court in submitting to the jury the question of bad faith."

II.—Also in the following portion of the charge: "I am of the opinion, and so charge you, that the evidence in the case is not such as would enable the jury to ascertain the amount of damages, if any, which the defendant sustained."

III.—Also in the following part of the charge: The Court instructs the jury to find a verdict for the plaintiff for the amount of his claim.

IV.—There was error in rejecting our offer, after evidence had been given of the amount of shortage in the output of the mill; extra cost of supplies for the mill; loss of country trade; refusal of customers to take paper, and expenditures for disabled employes, to ask John W. Stonebaker, the manager of the mill, who had testified to these facts, what he estimated the amount of defendants' damages to be.

V.—A medical expert having testified that there could be no more certain mode of spreading small-pox than by means of infected bales of rags, there was error in rejecting the offer to prove in corroboration of this opinion that the children of John Wirth, a rag dealer, had taken the small-pox from playing with infected rags.

VI.—There was error in excluding testimony of assorters (who had handled the Pittsburgh rags and had afterwards had small-pox, and who had testified as to the appearance of the rags and their effect upon the senses) that the witnesses believed they caught the small-pox from the rags in question.

A. H. CLARKE,
WM. McCRUM,
Counsel for Plaintiffs in Error.

ARGUMENT.

"Torts are infinitely various, not limited or confined; for there is "nothing in nature but may be an instrument of mischief." *Pratt* (LORD CAMDEN) *C. J.* in *Chapman vs. Pickersgill.* 2 Wils. 145.

FIRST QUESTION: Were these rags sold and sent by plaintiff to defendants with intent *to deceive, cheat and defraud them*, as alleged in our affidavit of counterclaim? (Record marginal p. 45).

It is, of course, obvious that Benedict did not prepare these rags with the *deliberate* purpose of murdering any one, but in his greed for illicit gain, he laid this flattering unction to his soul:—that the disinfection of the garments would prevent all disagreeable consequences to him and to the defendants alike.

When we proved that the rags were packed in his establishment under his personal supervision (Record, marginal p. 47), and adduced evidence that they were infected and by reason thereof defendants were injured (Record, marginal pp. 53 sq., 59 sq.), the presumption *de bono* was removed, and it was incumbent upon him to prove, if he could, that he was not culpable.

When a thing which is ordinarily innocuous is found to have done mischief, there is a presumption that he who prepared, made or had control of it is in fault.

Transportation Co. vs. Donner, 11 Wall. 134.
Rose vs. Trans. Co., 13 Rep'r 421.
Rintoul vs. N. Y. Central, &c., 17 Fed. Rep. 907.
Shearman & Redf. Negl. §71, 72.
Byrne vs. Boadle, 33 L. J. Exch. 13.

See a variety of cases collected and commented upon in 2 *Thompson on Negl.*, 1220 sq. particularly foot of pp. 1233 and 1235.

But our case rests on stronger proofs. The evidence of an effort to fumigate and otherwise disinfect the rags (Record, marg. pp. 54 to 61) amounted, in connection with Benedict's confession that he packed them, to full proof of the *scienter*.

In a civil issue there is no *legal* presumption against the fact of the commission of an act from its being a crime.

Lapsley vs. Grierson, 1 H. L. Cas. 498.

There is no general presumption of non-peccability in civil issues

Wharton, Evidence, §1245.

It will appear from the tenor of the remarks made in delivering the instruction to the jury (Record p. 75, marginal), that the enormity of the crime charged upon Mr. Benedict so shocked the mind of the learned judge that the evidence did not make the same impression upon him as it would and did make upon less charitable censors, to whom the motive, *auri sacra fames*, seemed an adequate and probable one to assign for the act.

It is submitted that if the criminal character of the act is relevant at all, it is not to be made a counterweight against positive proofs, in the decision of the preliminary *legal* question: whether the evidence would support a verdict. At most it raises a question of credibility, and this, of course, is exclusively for the jury. It has always been held that the criminality of the act charged in a civil action does not change the rule that private controversies are to be judged by the preponderance of evidence.

Wharton Evidence, §1246.
Payne, et al. vs. Solomon, 14 Bank. Reg. pp. 172–3.
Young vs. Makepeace, 103 Mass., 53.
Roberge vs. Burnham, 124 *id.* 278.

Even if there was no such damning proof of guilt as is afforded by the confession of the baling of the rags and the use of disinfectants, there would still be enough in the evidence brought up in the Bill of Exceptions to carry the question of deceit and fraud to the jury.

"If a man affirms that to be true within his own knowledge which "he does not know to be true, this falls within the definition of a legal "fraud:" *Lord Kenyon* in

Haycraft vs. Creasy, 2 East 103.
Litchfield vs. Hutchinson, 117 Mass. 195.

Benedict's not answering Stonebraker's accusation that he knew the rags were infected, (Record p. 69), and his attempts subsequently to fabricate a defense (Record p. 47) are persuasive of his guilt. His endeavor to have the rags sent to Markles' after he had been told that they were infected, shows what his notions of legal and moral duty were. The Markles and their employees were to be the next victims of his cupidity, and his first victims were to be his tools.

The defense which he put forward while he was *inops consilii* was, not a denial of the charge, not an indignant vindication of his conduct and character, but an emphatic assertion that he had never been detected before in his nefarious practices (Record marginal pp. 68–70).

SECOND: For the sake of argument, let us suppose Benedict ignorant that these particular rags were infected; let us assume that he had been able to persuade himself that they were harmless, in spite of his knowledge of the reckless way in which they had been collected; it is still submitted that he would have been guilty of culpable negligence in delivering them under a contract for clean, well assorted rags, without disclosing the fact (of which he must have presumed the vendees to be ignorant), that an infectious disease, dangerous to Human Life, was raging in the districts where they were collected.

"The common law has a peculiar regard for human life, and for this "reason exacts a greater degree of care when life is at peril than in "relation to any mere matter of property."

Wharton Negl. §24.
Shearman & Redf. Negl. §54 end.

Ordinary care must be measured by the character and risks and exposures of the business; and the degree required is higher when life or limb is endangered.

Cayzer vs. Taylor, 10 Gray 274.

Unusual danger calls for unusual precaution.

Klein vs. Jewett, 26 N. J. Eq. 474.

Great precautions are enjoined by all civilized governments against the extraordinary peril to Human Life and to the Public Health where malignant epidemics are raging, or when the introduction of them is apprehended.

The State of Maryland has provided that when the Governor has "strong grounds to apprehend that there is danger of any malignant "contagious disease being introduced into this State, * * he may "compel any vessel to ride quarantine, and may forbid all intercourse "or communication, either by land or water, between this State and "the place affected, or lay such intercourse under such regulations, etc." Code of 1878, Art. 6, §18, p. 63. And with special reference to smallpox, it has made vaccination compulsory, imposing penalties upon parents for neglecting it, and upon physicians for refusing to perform it, or for performing it improperly.

Ibidem Art. 25, §§ 10 sq.

The Municipal Corporation Act of Pennsylvania [1874] authorizes

local boards to take stringent measures for the isolation of infected persons in pest-houses, the destruction of dangerous substances, and the prohibition or regulation of dangerous pursuits.

Purdon's Dig. 1235 pl. 148, 149.

The general Health Laws for the port of Philadelphia prohibit the introduction of persons, goods, wares, clothing, or bedding coming from places where any malignant or contagious disease prevails, unless under the regulation and control of the Board of Health. These laws denounce severe penalties, including forfeiture of the goods, etc.

Purdon's Dig. 1552 pl. 89, 90.

Congress has provided regulations upon this subject, and has recognized and affirmed the validity of the above cited State enactments.

Suppl. to R. S. 313, 485.

The Sundry Civil Expenses Appropriation Acts of 1882 and 1883, each authorized the President to expend $100,000. In aid of state and local boards or otherwise, in preventing and suppressing epidemic diseases. The sum of $50,000 was appropriated for the National Board of Health, and its duties were confined to cholera, *small pox*, and yellow fever. The first-mentioned appropriations were continued by the acts of 1884 and 1885.

22 St. at Large, 315, 413.

23 St. at Large, 207, 496.

In a well considered New York case, defendant was held to be justified by the common law in destroying a filthy tenement belonging to plaintiff.

Meeker vs. Van Rennselaer, 15 Wendell 397.

Wood on Nuisances, §736 sq.

The cases of negligent selling, etc. of *dangerous goods* are collected in

1 Thompson on Negl. 224 sq.

All these cases insist upon a higher degree of care and a more extended liability (including even remote effects) than where the negligence does not obviously imperil human life.

Adopting the language of RUGGLES, C. J. at page 229, of Thompson's work, we may say that Benedict's contract to deliver clean, nicely assorted rags of his own packing was a guaranty to his vendees that the rags "had passed through some process under his hands which would "give him personal knowledge of their true quality."

In *Boston & Albany R. R. Co. vs. Shanly*, 107 Mass. 568, the respective shippers of two articles which were dangerous when in contact with each other, were both held liable for damage resulting from the carrier's

placing them in contact—the shippers not having given full notice of the character of the goods.

One of the articles was described by its name, but as it was a new substance, this was not sufficient notice.

In *Wellington vs. Downer Kerosene Co.*, 104 Mass. 64, the defendant sold naphtha to a retailer, knowing that it would be resold for use in a house-lamp and that such use was dangerous. He was held liable both at common law and under a statute on the subject.

In *Minor vs. Sharon*, 112 Mass. 477, defendant was held liable for letting a tenement where small pox had been to plaintiff, without telling of the danger. See a similar case in 60 N. Y. 229.

In *Span vs. Ely*, 8 Hun. 256, the defendant, a physician, employed plaintiff to whitewash a room where they both knew there had been small pox, but defendant assured the plaintiff it had been thoroughly disinfected. In point of fact the disinfection had been imperfect, and defendant was held liable because of the assurance he had given plaintiff.

The considerations which prevailed against us in the court below were strongly urged for the defendants in the last-cited cases, viz: "that the connection between the origin of the disease and the disease "itself is not a matter cognizable by our senses," and "the source of the "contagion and the manner of its communication is too uncertain and unsusceptible of proof to form the foundation for an action." They are well answered by MORTON J.

The case in 104 Mass. 64, refers with approval to *George vs. Skivington* L. R. 5 Exch. 1, where there was no *scienter*, but the defendant, an apothecary, was held liable for damage caused by a hair-wash which he represented to be fit and safe. Comparing this case with *Langridge vs. Levy*, 2 M. & W. 519 (sale of a gun known to be defective, but warranted to be safe for use of the vendee and his son, the plaintiff) CLEASBY, B. said: "Substitute the word *negligence* for *fraud* and the analogy is complete."

The case at bar is stronger than those cited: for Benedict expressly contracted with the persons injured to furnish clean, nicely assorted rags that would not require reassorting.

Wharton on Negl. §435, 437.

If Mr. Benedict chose to buy rags in these infected districts "from "all or any persons offering him merchantable rags, not knowing where "they were collected" (Record marginal p. 47), we think it clear that he at least owed the duty to his vendees of putting them on their guard against the fearful risk they incurred.

He not only omitted this duty but lulled all possible suspicion by falsely promising clean, well-assorted rags.

When the representation expressly or impliedly forms part of the contract—as in our case, where the rags were not only described by the vendor as clean, but were shipped under an order calling for clean, nicely assorted rags, and were thereby represented and warranted to be such—it is not necessary to allege moral fraud: and if alleged, it is not necessary to prove it. 2 Sm. L. Cas. *170.

Nat'l Exch. Co. vs. Drew, 2 Macq. H. L. 103, 144.

THIRD: As to the damages. There is abundant and unimpeachable testimony to the fact that the rags sold under these specious promises turned out to be a huddle of whole garments and filthy bed-clothing reeking with small pox, and that he had endeavored to disinfect them.

In consequence of this false representation, made *lucri causa*, defendants were involved in heavy pecuniary loss. Their employes were stricken with the contagion, the operations of their mill were almost entirely suspended and their good name was compromised; for this dreadful calamity—although it was the fraud practiced upon them by Benedict that alone made it possible—was presumed by the public and by their customers to have been caused by their negligence. Such a presumption would naturally arise in the mind of any one not informed of the deception.

And this public reprobation was the more galling and injurious that they were compelled to seek redress from the real criminal in a place so remote that a vindication of their conduct *there* could scarcely correct the prejudice his wanton and diabolical act had raised against them at home.

In *Day vs. Woodworth*, 13 Howard 371, Mr Justice GRIER, in delivering the opinion of this court, says:—"It is a well-established principle of the Common Law that in all actions on the case for torts, a jury may inflict what are called exemplary, punitive or vindictive damages upon a defendant, having in view the enormity of his offence rather than the measure of compensation to the plaintiff."

"Where the injury is wanton or malicious, a jury may inflict vindictive or exemplary damages, not to recompense the plaintiff, but to punish the defendant."—Mr Justice GRIER in *Seymour v. McCormick* 16. How. 489.

Mr. Justice CAMPBELL, speaking for this court in *Phila. etc. R. R. Co. vs. Quigley*, 21 How. 214, says, "The word [malice] implies that the act complained of was conceived in the spirit of mischief, *or of criminal indifference to civil obligations.*"

These principles are applied in *Berry vs. Fletcher*, 1 Dill. 71.

Milwaukee & C. R. R. Co. vs. Arms, 1 Otto, 489.

"A manufacturer who sells his product as an illuminating oil, bearing "the high and safe fire test of 110°, when in fact he knows that its fire "test will not exceed 64 or 65° * * can plead nothing in defense of "this wilful, terrible wrong done to a confiding community. He bears "within him a heart regardless of social duty, evidencing malice (in its "legal sense) in a high degree.

AGNEW C. J. in *Elkins, Bly & Co. v. McKean*.. 79 Pa. St. 493-503.

In this case Judge Agnew intimates (p. 500) that the question might properly have been *negligence* in putting the oil on the market. WILLIAMS J. thought there was evidence of knowledge.

In an action for wilful negligence (recklessness), the jury may take into consideration the defendant's motives, and if the wrong is accompanied with contempt of plaintiff's rights and convenience, they may give exemplary damages.—*Emblen v. Myers*, 6 H. & N. 54 ; 30 L. J. Exch 71. See American editor's note.

Bell v. Midland Ry. Co. 10 C.B. N.S. 287.

Field on Damages, §54, 57 id. §70-73 ; id. 84.

In *Hawes v. Knowles* 114 Mass. 518, Chief Justice GRAY says, "In an action for a wilful injury, the manner and manifest motive of the wrongful act may be given in evidence as affecting the question of damages ; for when the mere physical injury is the same it may be more aggravated in its effects upon the mind, if it is done in wanton disregard of the rights and feelings of the plaintiff than if it is the result of mere carelessness.

In *Meagher v. Driscoll* 99 Mass. 281 (trespass q. cl. fr. against superintendent of cemetery), damages were allowed for injury to plaintiff's feelings, defendant having proceeded in wilful disregard or careless ignorance of plaintiff's rights in a burial lot.

Even in assumpsit fraud may be shown in aggravation, though not as the cause of action ; and plaintiff may recover when he shows that the promise declared on was a fraud, and may aver and prove that it was made deceitfully and fraudulently.

1 Smith's Lead Cas., 324 * 271.

Contemptuous and insulting conduct in the breach of a contract may be shown to aggravate the damages.

Coppin v. Braithwaite, 8 Jur. 875.

In replevin and trover, exemplary damages may be recovered for more than ordinary wrong in the taking or detention.

McDonald v. Seif, 11 Pa. St. 386.

Craig v. Kline, 65 id. 399.

Damages were recovered for the *wanton* and *malicious* exercise of a right to the injury of one whose rights were conceded to be subordinate, in

Cobb v Bennett, 75 Pa. St. 326.

See cases proper for the infliction of punitive damages referred to in *Wood on Nuisances*, §868 end.

The court should be liberal in the admission of evidence on the question of damages in an action in which there is some evidence of malice, with a view to a proper submission of it after hearing the whole case.

Douty v. Bird, 60 Pa. St. 48.

In *McAfee vs. Crofford*, 13 How. 447, the seizing and carrying off of plaintiff's slaves by defendants prevented their saving wood, a flood happening to sweep it away; and left crops ungarded so that the cattle of neighbors destroyed them; ~~and though~~ plaintiff had not fenced according to law. Mr. Justice McLEAN, delivering the opinion of the court, said, "The trespass was of an aggravated nature * * It gives a high claim to the injured party for exemplary damages," and instructions were approved which submitted the above items of damage to the jury, and directed them to to consider all the circumstances.

In *Dayton vs. Pease*, 4 Ohio N.S. 80 (a case of mere negligence), it was ruled that a millowner may recover for partial obstruction of water power, and for temporary diversion by himself, for the purpose of removing the obstruction.

The increased difficulty of ascertaining the damage in consequence of plaintiffs' having been able to keep the mill in operation to some extent, was supposed in the court below to disentitle them to any damages whatever. But the authorities show that we were bound to do what was possible to lessen the injury.

Pa. R. R. Co. vs. Titusville, etc., 71 Pa. St. 356.

In *Pa. R. R. Co. vs. Dale*, 76 Pa. St. 47 (a case of mere negligence) prospective profits from an established business were recovered.

And see various cases mentioned in Wood on Nuisances, §876, §873, (2d edition).

FOURTH: As to the offer to elicit the manager's opinion of the aggregate loss, we refer to *White Deer Cr. Impt. Co. vs. Sassaman*, 67 Pa.

St. 421, where AGNEW, J., said: "There is no error as to the opinion "of the witness upon the amount or value of the damages. As to un- "liquidated damages—the result of an injury complicated in its circum- "stances—a witness acquainted personally with all the facts must be "permitted to give his opinion. Such matters are difficult of descrip- "tion, very few men being gifted with that power of description of com- "plex subjects which can picture them to the minds of others." He cited several cases to show that the opinions of persons specially informed on the subject are competent. The witness may be cross-examined on the details. The rule contended for saves time, for the opinion may be satisfactory to the opposite party.

FIFTH: *Beatty vs. Gilmore*, 16 Pa. St. 463: A witness who has examined the thing which caused the injury may give his opinion that it was dangerous.

It seems to be proper to elicit the belief of a witness as to the existence of a fact in issue where his opinion is the result of inductions from an infinite variety of details that are within the witness's knowledge and can not be perfectly described to the jury; as in questions of *identity, genuineness of writings, insanity, state of the affections, or other mental conditions.*

Taylor on Evidence, §1416.

Best's Pr. of Ev. §517 (Am. Ed. 1883).

SIXTH: A recognized exception to the rule which excludes collateral facts is where the question is a matter of science, and where the facts tend to illustrate or corroborate or to discredit the opinions of scientific witnesses: *e g.* Engineers having given their opinion as to the effect of a sea-wall in causing the choking up of a harbor, proof that other harbors on the same coast, where there were no embankments had begun to be choked up at the same time was admitted.

Folkes vs. Chadd, 3 Doug. 157.

Best's Pr. of Ev. pp. 487–8, (Am. Editor's note).

Respectfully submitted,

A. H. CLARKE,
W. MACRUM,
Counsel for Plaintiffs in Error.

120-620

FILED
JAMES H. McKENNEY
CLERK

SUPREME COURT OF THE UNITED STATES,

No. 93 October Term, 1886.

JOHN A. DUSHANE AND ANOTHER,
Plaintiffs in Error, Defendants below,
against
JOSEPH BENEDICT.

BRIEF ON BEHALF OF PLAINTIFFS IN ERROR

To prove their right to counter-claim for damages they sustained by the fraud and wrong of Joseph Benedict in the transaction upon which he grounds his claim,
And a short account of the law and practice in Pennsylvania with reference to the

RIGHT OF SET-OFF.

SUBMITTED BY LEAVE OF COURT AFTER ARGUMENT.

W. MACRUM,
Of Counsel.

IN THE

SUPREME COURT OF THE UNITED STATES,

No. 93 October Term, 1886.

JOHN W. STONEBRAKER AND JNO. A. DUSHANE, Partners as the Antietam Paper Company, Plaintiffs in Error,

vs.

JOSEPH BENEDICT.

Writ of Error to the Circuit Court of the United States for the Western District of Pennsylvania.

ARGUED DECEMBER 14–15, 1886.

ADDITIONAL BRIEF *EX PARTE PLAINTIFFS IN ERROR,*

handed up by leave of Court,

To prove that the demand of plaintiffs in error for unliquidated damages, arising out of the transaction upon which is grounded the claim of Joseph Benedict in his action in the Circuit Court, may be litigated in said action by way of set-off or counter-claim.

1. In the course of the oral argument, I repeatedly asserted (and I still maintain) that the subject-matter of our counter-claim

is substantially a tort. As stated in our brief opposing the motion to dismiss, it *includes* the breach of an express warranty embodied in the executory contract made at Hagerstown; but it also amounts to a breach of Benedict's duty to his neighbors, abstracted from any merely *contractual* duty or obligation. In other words, if we supposed there had been *no* such express warranty, and supposed further that the evidence of guilty knowledge—or its equivalent in a private wrong, blind and fraudulent recklessness of consequences—was sufficient to carry the case before the jury (and I believe that the Court on perusing our uncontradicted statement of the case, or the bill of exceptions, will be compelled to adhere to the latter supposition)—supposing, I say, these two things: then our cause of action would necessarily be in tort, and if we were to bring a common law action, its form must be *case*. But our present action is founded upon the defalcation acts, and these statutes do not prescribe any *form* of action known to the common law. They confer a *right* in terms the most general and comprehensive, and leave the *courts* to frame or sanction the appropriate declaration of the cause of action. The plaint must be made according to the nature of the grievance, and in conformity with the substantial rules of good pleading. In this point of view, the statutes may be regarded as analogous to the Stat. of Westm., the II, c. 24 (Roberts' Dig. of British Statutes, 157, 158), which conferred upon the clerks of the chancery the power (or rather imposed upon them the duty) of framing writs *in consimili casu*, according to the nature of the "consimilar" case.

In Pennsylvania, beside this statute of Edward I., there is an Act which is of similar but much wider scope. The Act of June 16, 1836, § 3 (Pamph. Laws, 786), makes it "the *duty* of the Supreme Court at their sessions in banc, from time to time to devise and establish by rule of court such new *writs* and *forms of proceedings* as in their opinion shall be necessary *or convenient* to the full, direct and uniform execution of the powers and jurisdiction possessed by common pleas * * courts." [N. B.—It is the common pleas courts that have jurisdiction of such controversies as the claim and counter-claim in this cause.]

The succeeding section (4) is a proviso "that nothing herein

contained shall be deemed to authorize the Supreme Court to enlarge, abridge or alter the jurisdiction of any of the courts, or to impair the right of trial by jury, or to dispense with, or to supply the use of, any form of proceeding which shall be made necessary by any Act of Assembly."

"Section 5. Whenever the said court shall devise and establish any new writ or form as aforesaid * * * they shall cause notice thereof to be given to the courts, or to the president judges of the courts, for which such writ, form or rule shall be made or appointed, and also to the Governor, for the information of the Legislature at their next session."

Section 6 points out the manner of promulgating RULES as contradistinguished from writs and forms, which are devised as occasion arises, and therefore do not need to be promulged.

Thus we see a duty prescribed by the supreme power in the State; and it is to be presumed that the body upon which the duty is imposed, being a co-ordinate part of the Government, has in all cases performed it. It must also be presumed that the practice of the United States Circuit Court conforms "*as near as may be* to the practice, pleadings and forms and modes of procedure in like causes in the State courts." Now, it is impossible that the Supreme Court of Pennsylvania should undertake to *impose* any particular form of procedure on a court not inferior to it; a court of an independent sovereign; so that the only way in which a particular form of procedure within this statute can become the practice in the Circuit Court is by imitation or express adoption; either mode being a sufficient compliance with R. S. § 914.

On perusing the fifth section of the Act of 1836 *supra*, it will be found that the Supreme Court may prescribe different modes of procedure for the different common pleas courts in the several counties; the uniformity spoken of in section 3 being an uniformity in the course of the individual courts to which the Supreme Court may address its mandates. In this state of affairs the Circuit Court might elect to conform either to the practice in Allegheny county or the practice in Philadelphia county, etc., etc. I presume the learned Justice of the third circuit may be appealed to upon the question whether the practice of the Circuit Court in

the Western District of Pennsylvania does not conform substantially to the practice of the Allegheny county courts.

Having then, in the supreme tribunal of the State, a power to prescribe, as well as the ordinary power to supervise, procedure, the presumption is strong that a court of common pleas which allows to be filed of record by one of its attorneys, as part of the pleadings in the cause, an affidavit such as we filed October 14, 1882, is not exceeding its jurisdiction. When the adverse party traverses the allegations of that affidavit and issue is joined, the presumption is strengthened *omnia rite esse acta.* And when the cause is removed into the Federal court and tried on the merits without objection, we have another great make-weight in the presumption that that court has adopted the practice of the Allegheny county or some other court, to which it has been duly prescribed.

It is supererogatory to inquire whether in point of fact the Supreme Court has ever *expressly* exercised the powers conferred by the Act. It has the power to correct if what the inferior court does is erroneous, and the want of correction argues approval. Here we have a case precisely analogous to the beneficial fiction whereby the expense and delay of issuing original writs from the chancery were avoided by proceeding upon the mere supposition or pretence that that "royal warrant to the justices to proceed to the determination of the cause" had been issued.

2. In asserting that Benedict's act amounted, independently of any contractual relation or duty, to a breach of his duty *sic uti suo ut alienum non laederet,* I did not at all intend to admit away our right to submit the following argument, which is shadowed forth in both the former briefs: Suppose that what has been said before fails to convince the Court that it is competent in an action on a contract, to counter-claim for a tortious act connected with the contract, but not constituting a breach of any of its terms; still we have the right to take advantage of the technical rule of pleading alluded to by Mr. Justice GRAY in the course of the argument, to wit: that in an action for breach of warranty the pleader has his election (whether the warranty includes a false and fraudulent representation, as in the case now *sub judice,* or is merely a promise of indemnity) to frame his *narr.* either in assumpsit

or in case. His election does not affect the measure of damages; that is fixed by the circumstances of the case, not by the mere form of the action. In an action of assumpsit for breach of warranty, actual fraud and deceit may be laid and proved in aggravation of damages, as may willful wrong, or gross fraud, or outrageous or contemptuous treatment, in assumpsit against a carrier.

Now, our affidavit of counter-claim is more nearly a declaration in assumpsit than a declaration in case. It states the contract, and particularly the express warranty that the rags *were* "clean, nicely assorted print and book rags." It then states the breach; and the *scienter* is averred *after* the allegations of special damages. Evidently it is laid merely as aggravation.

[See Record marginal, p. 43.]

3. It is beyond doubt that some of the items of damage alleged and proved are within the rule of law on this subject of set-off, even as laid down by the opposite counsel, *e. g.* the $200 in money expended for the support of employees disabled by the disease. [It may here be remarked, that the assumption made by the learned counsel on page 11 of his brief, that this was "an act of charity," etc. is entirely *gratis*. He is no more warranted in imputing charitable motives to Mr. Stonebraker, without evidence, than motives of another kind. The motive of the act is utterly immaterial, though I admit that if it had been a mere private charity of Mr. Stonebraker, the firm could not include it in the damages. The question is, was it an act rendered reasonably necessary by Benedict's wrongful conduct? If the enlightened selfishness of these mill-owners told them that by leaving their employees to perish with want, in consequence of a disease with which they were stricken in the mill, they would probably involve themselves in greater loss, it was obviously wise policy to spend this moderate sum. The evidence is, that the money so spent was the firm's money, and there is no evidence that Stonebraker's partner expressly assented to the outlay, either as a charity or otherwise. On the contrary it was to the effect that he lived in Baltimore and knew nothing of the details of the management. Convinced by these considerations the learned Judge finally admitted proof of this item.]

We are entitled (it is conceded or proved) to set off at least this one item of our damages. If we use our right, what becomes of the other and larger items, and of the one we most insist on, viz.: some *solatium* for outraged feelings, some measure of punishment to this sordid criminal? If the Court struck out these because of a merely formal objection not founded on anything in the statutes, not warranted or countenanced by any decision or *dictum*, could we recover them in a fresh action? That deeply learned and painstaking Judge, the late George Sharswood, of blessed memory, said such a thing was not legally possible; and—in the emphatic language employed by him in *Hunt vs. Gilmore*, 59 Pa. State 450-4—to drive us to a cross-action, after making us pay the contract price for rags that were not according to contract, would be "in the teeth of the policy of the statute."

If the rule were that we may use our right to set off any unliquidated damages except those which are vindictive, exemplary or punitive (a position now conceded by our opponents), it would sanction these anomalies: that when we sued for this item, the second jury could scarcely avoid taking into consideration the elements of damage included in the former verdict. However clear the limits of their duty *theoretically*, the jury could not in the concrete (no matter how carefully instructed) draw the line so as to exclude matters and circumstances covered by the compensatory verdict. Indeed, it would be a new and embarrassing legal problem for the Judge to discriminate in his instructions, however obvious the line of demarcation may seem upon a superficial view.

It will be perceived that I suggest this rather as *amicus curiæ*, because if the rule *were* adopted it would tend to put double damages in my client's purse.

Should the rule be that we may counter-claim for so much of our damages as would extinguish the plaintiff's demand, and that we must bring an action for the surplus? To test this, let us suppose claim and counter-claim in the original action *both* for unliquidated damages. A verdict *for the defendant generally* would be recorded in case the counter-claim was made good. But when the defendant sued for the surplus of his counter-claim, how could the jury in his action know what were the sums ascertained on the one side and the other by the first jury? Does not this

give the counter-claimant almost the certainty of collecting double damages; or at least does it not involve the necessity of submitting the subjects adjudicated by the judgment on the first verdict, to a re-examination and a readjudication?

The record of the first judgment would leave it uncertain whether the plaintiff had utterly failed in his action; or had only been thought entitled to nominal damages; or what the amount of his substantial damages was.

If it is thought we should forego our right to set off *any* of the items of our claim (even those now admitted to be proper subjects of set off) and go for the whole in a cross-action, this would involve the legal absurdity of allowing Benedict to enforce payment for rags we did not agree to buy, in an action on a contract which was broken by him the moment it was made. Suppose him insolvent, he might collect the amount of this judgment, founded on his own fraud and iniquity, and laugh at our cross-demand.

But it may be suggested that a Court of Equity would decree a set-off and restrain the collection of his judgment, to prevent the consummation of this fraud. The suggestion tends to support my contention, for it is well-known that the common law tribunals of Pennsylvania have from their establishment administered equity through the forms of common law procedure, and this can only be done by admitting our equity as a defence to the action. This power of the courts was not impaired by the statutes which conferred jurisdiction according to the course of chancery.

But on the true construction of the defalcation acts, suggested above, our right is legal, and the circuity of an injunction to restrain the proceeding at law would be, in the language of Judge Sharswood, "in the teeth of the policy of the statutes."

A valid objection to the injunction in the State courts would be, that the remedy at law is adequate.

As is usual when a false principle of construction is suggested, it involves a host of absurdities and inconveniences.

No argument can be made against the position for which we contend except this (which rather makes against the objector), that no case deciding this question has been reported. Is it not prob-

able that on grounds of convenience the profession and the lower courts have adopted the suggestions of Judge Sharswood on this point of practice, and have thought it beneficial to both parties to have "one jury pass on the whole case?"

Our Pennsylvania defalcation Act is as old as the Province, William Penn having embodied it, "*for avoiding numerous suits,*" in "the Great Law * * passed at an Assembly held at Chester, *alias* Upland, the seventh day of the 10th month, called December (old style), 1682, c. 41."

Duke of Yorke's Lawes, &c., p. 118.

In the Act of 1705, Penn's proviso that "they be of *equal* clearness and truth" is omitted; which, of course, enlarges the purview of the law.

One reason why our statutes received a larger construction was, that after the abolition of Governor Keith's Chancery, there was no such thing as a court of equity. There could be no injunction to set one judgment off against another. In order to protect equitable rights the courts were compelled to struggle with, and wrest from their appropriate use, the common law forms of action and procedure.

The fair and liberal construction for which we contend falls very far short of what the courts have done in order to give suitors a convenient remedy in other cases. 1 TROUBAT & HALY'S Practice, § 29 sq.

In justification of the remark I made as to the state of knowledge among Pennsylvania lawyers upon the subject of pleadings, let me refer to Judge Gibson's strictures upon the pleadings in *Sherk vs. Endress*, 3 Watts & Sargeant, 257.

The truth is, we have a dual system, consisting of pleadings at common law (or blundering attempts at pleadings), and affidavits of claim and defence which are the real pleadings, though technically no part of the record. In them the issue is developed, but on the record the pleadings seldom go beyond the plea properly so called; and the practitioner who insists on formality is denounced by his injured *confreres* as a martinet and a prig.

In support of this account of our practice, let me refer to 1 TROUBAT & HALY'S Pract. (5 ed. by Brightly), §§ 399, 595,

539 sq. 545 sq.; ANDERSON'S Rules of Court (Allegheny Co.) p. 49, *ib.* p. 3.

Rule 127 provides that all *substantial* as well as formal defects shall be deemed cured by pleading over without demurrer, and shall not be taken advantage of in arrest of judgment. The party may object thereto at the trial—subject to proper terms as to costs—by praying the Court to charge that the evidence—proving only the facts averred in the pleading—does not establish a sufficient claim, p. 53.

Rule 143. If an issue be formed, substantially, by the pleadings, formal joinder may be entered by the prothonotary or supplied at any time, *if desired.*

Rule 145. If a cause is not struck off *for want of an issue* when the list is first called over, neither party shall afterwards object to (*sic*) the want of a formal issue as a ground for continuance; but the *Court* will enter the *general issue* and the cause shall proceed to trial on such issue, with leave to *add* [*not to substitute, but only to* add] any other plea which justice may require.

I may say that throughout the State, elsewhere than in Philadelphia, it is quite common, though not universal practice, for the plaintiff to begin, and to assume the burden of proving his case, though the defence as presented in the pleadings and affidavits is by way of confession and avoidance.

Very commonly too, in such cases, the plaintiff follows this up by securing the conclusion from an unwary adversary. All this, of course, results from inattention to formalities.

Rule 84 of the Circuit Court of the United States for the Western District of Pennsylvania orders, "that the common practice hitherto prevailing of putting-in general pleas in a short and informal manner shall be abolished, and the plea, replication and all other pleadings shall be put in at large, and according to the forms prescribed by approved books of practice."

This rule which originated, I believe, in Judge GRIER'S time, has not been observed or enforced of late years. Perhaps it is regarded as abolished by the Act of Congress introducing the State practice, which Act contains a *non obstante.*

In *McFaul vs. Ramsey*, 20 How. 523, Judge GRIER criticises

with characteristic and incisive rhetoric the "ruthless" abolition of the venerable common law system of actions and pleading. Perhaps the *juste milieu* would be established by adding to or reclassifying the forms of action, as the Pennsylvania statute seems to intend, and by requiring the *allegata* to be supported by an oath, more or less positive, according to circumstances and the information at the command of the party. This would suppress sham pleas and groundless surmises, and admit only what the parties *know* they can prove, or can swear safely that they expect to be able to prove, at the trial.

In conclusion, I solicit an examination of the brief I filed in opposition to the motion to dismiss; and of the authorities there cited.

Respectfully submitted,

W. MACRUM,
Of Counsel.

IN THE SUPREME COURT OF THE UNITED STATES.

No. 93.

OCTOBER TERM, 1886.

JOHN A. DUSHANE *and* JOHN W. STONEBRAKER,
Plaintiffs in Error,

versus

JOSEPH BENEDICT.

BRIEF OF DEFENDANT IN ERROR.

The judgment below in favor of defendant in error is for $866.31.

The record, which is brief, discloses these facts: Benedict, the plaintiff below, a citizen of Pennsylvania, sued Dushane and Stonebraker, citizens of Maryland, in assumpsit for goods sold and delivered. The suit was brought in the Common Pleas Court of Allegheny county, Pa., and was removed on application of the defendants below to the U. S. Circuit Court for the Western District of Pennsylvania. The plaintiff below was a dealer in rags at Pittsburgh, Pa., and the defendants were the owners of a paper mill, at Hagerstown, Md. The plaintiff below sold and delivered the defendants some 65 bales of rags for $813.03. The sale and delivery of the goods at the prices charged was admitted by the defendants below, but they claimed that the rags were, to the knowledge of the plaintiff below, infected with small-pox, which was communi-

cated to their employees, causing them the expenditure of money, stoppage in work, and injury to their business.

Their plea (Record, page 26) is as follows:

> "Defendants plead payment, with leave, etc., and the special matter stated in affidavits of defense, and they claim damages upon the cause of action stated in said affidavits, in the sum of $7,000, in excess of the amount sued for by plaintiff."

Under the instructions of the Court, the jury rendered a verdict in favor of the plaintiff for $866.31, on which a docket entry of judgment was made.

The Pennsylvania statute of set-off, or of "defalcation," as it is styled, is the act of 1705. It will be found in 1 Brightly's, Purdon's Dig., 487, and is as follows:

> "If two or more dealing together be indebted to each other upon bonds, bills, bargains, promises, accounts, or the like, and one of them commence an action in any Court of this province, if the defendant can not gainsay the deed, bargain or assumption upon which he is sued, it shall be lawful for such defendant to plead payment of all or part of the debt or sum demanded, and give any bond, bill, receipt, account or bargain in evidence; and if it shall appear that the defendant hath fully paid or satisfied the debt or sum demanded, the jury shall find for the defendant, and judgment shall be entered that the plaintiff shall take nothing by his writ, and shall pay costs. And if it shall appear that any part of the sum demanded be paid, then so much as is found to be paid shall be defalked, and the plaintiff shall have judgment for the residue only, with costs of suit. But if it appears to the jury that the plaintiff is over paid, then they shall give in their verdict for the defendant, and withal certify to the Court how much they find the plaintiff to be indebted or in arrear to the defendant, more than will answer the debt or sum demanded, and the sum or sums so certified shall be recorded with the verdict, and shall be deemed as a debt of record, and if the

plaintiff refuse to pay the same, the defendant for recovery thereof, shall have a *scire facias* against the plaintiff in the said action, and have execution for the same, with cost of that action."

The act of April 11, 1848, sec 12 (P. L. 537) provides that the defendant on certificate in his favour shall be entitled to judgment and execution and need not resort to a *scire facias*.

At the October Term, 1883, of this Court, the defendant in error moved to dismiss for want of jurisdiction, on the ground that the amount was insufficient, the judgment in favor of the defendant below being for $866.31; and the so-called set-off being for damages in tort, and not the subject matter of set-off under the Pennsylvania Statute.

This motion was denied by the Court, for the oral reason assigned, that it involved an examination of the merits.

As this Court did not decide that this matter of defence below could be the subject of a set-off, so that the defendant on proper proofs could have a verdict and judgment in his favor, we assume that this still remains a question in the case, as this Court would not reverse and remand the case for a new trial, if the Court should be of the opinion that the subject matter of defence could not be litigated in this action. Upon this point we submit the following argument:

It is apparent that the claim of the defendants below does not come within the wording of the statute and was not such as could be pleaded by way of set-off, either at common law, or under the English statute; possibly it may have been matter of recoupment, but that would only have been to the extent of plaintiff's claim, and there could be no judgment for any excess.

Was defendants' claim such as brought it within the provisions of the Pennsylvania statute?

Their plea for their cause of action refers to the affidavits of defence. Rec., pp. 6 and 11. If we have recourse to those, we find their complaint to be that the plaintiff below *knowingly* and *wrongfully* sold them rags to be manufactured into paper, which were infected with small-pox. Their plea not only sounds in tort, but complains of the plaintiff's tortious act. As a cause of action it is wholly *ex-delicto*, and was so claimed by defendants. (Rec., foot of p. 16.)

The Supreme Court of Pennsylvania, in construing this statute, has uniformly held that damages sounding in tort, or arising from a tortious act, can not be set off.

The following are the principal cases in that State:

4 S. & R. 249. *Heck* vs. *Sheener*.

In an action to recover for services as housekeeper, evidence that plaintiff was guilty of malfeasance, and embezzled goods of defendant, is not admissible by way of set-off, but may be received under the plea of non-assumpsit to defeat the action. The act does not comprehend matters of a tortious nature, or (p. 258 and cases cited) where the damages sound in tort, and the remedy might be in covenant.

5 S. & R., 117. *Goxel* vs. *Yacoby*.

Matters sounding in tort arising out of a different transaction cannot be given in evidence as a set-off, though they may be taken advantage of when they arise out of the same transaction *to defeat the plaintiff's action*.

"The Court in its opinion says: Without undertaking at present to draw the line which limits the right of defalcation, it may be safely affirmed that defalcation is not permitted by reason of any demand against the plaintiff for an act done by him of *a tortious nature*."

10 S. & R., 14.

Defendant's claim for unliquidated damages from a tortious act cannot be urged as a set off.

59 Pa., St. 450. *Hunt* vs. *Gilmore.*

Unliquidated damages arising *ex-contractu* may be set-off under the Act of 1705. When the damages arise from a tort, they certainly cannot be allowed. [p. 452.]

In *Halfpenny* vs. *Bell*, 1 Norris, 130, Justice Paxon closes the opinion of the Court by saying: "If the damages sought to be set off arise from any tortious acts, we concede, under all the cases, they could not be allowed."

84 Pa., St. 319. *Ahl* vs. *Rhoads et al.*

This is the last case in the Supreme Court of Pennsylvania involving this phase of the construction of the Act of 1705. It was a suit or a mortgage given to the plaintiff by a bank, and the assignee of the bank endeavored to set off under this act the loss which he alleged the bank had sustained by reason of the misfeasance and negligence of the plaintiff as a director of the bank. The Court held that it could not be done, as these were damages arising from a technical tort.

To test this matter, suppose the plaintiffs in error should sue to recover the damages they allege they sustained. What form of action would they necessarily bring? The only possible ground for an action *ex-contractu* would be for breach of an implied warranty. The only warranty implied by law is of title, and in some cases that the articles sold were adapted to the purpose for which sold. They make no question in this case of any want of title in the defendant in error, or that the rags were not adapted to make the paper for which they were bought. In fact the record shows that they were all manufactured into paper.

Where warranty of fitness is implied by law, the *scienter* of the vendor is immaterial. The wrong done in a case of this kind, is in *knowingly* selling rags infected with small-pox, and hence the burden of the efforts of the defendants below in their affidavits of defense, and in testimony, was to show circumstances from which a jury might infer that the plaintiff below had knowledge that these rags were so infected, and knowingly and wilfully sold them notwithstanding such alleged infection. Hence, any action brought directly by the plaintiff in error would necessarily be in form *ex-delicto* for the tort, and, therefore, under the authorities cited, could not be pleaded by way of set-off. It is respectfully submitted that the writ should be dismissed as the matter in dispute can only be the judgment in favor of the plaintiff below, which is for eight hundred and odd dollars.

Whilst this point does not seem to have been made in the Court below, yet, we submit, that it is properly made now. If the judgment had been against the plaintiff below and he had sued out the writ of error, it might well be claimed that, inasmuch as he had gone to trial on this issue without objection, it was too late now. But the defendants below are the plaintiffs in error, and are asking the Court to reverse the judgment against them, and to remand the cause for a new trial upon a matter which, upon a new trial, if we are right, they could not be permitted to prove.

Bill of Exceptions.

The first exception is upon page 26 of the record Defendant's counsel offered to read an evidence from the deposition of one Mrs. Garlock, her answer to the 8th interrogatory as to the cause of the breaking out of small-pox in that vicinity, which was as follows:

"I believe it came from the Pittsburgh rags; they smelled badly and made me very sick, and seeing what I believed to be sulphur in these rags, I think they were the cause of my taking the small-pox."

The Court sustained the objection of plaintiffs' counsel to the admissibility of this opinion of the witness in evidence, to which the defence excepted, and this is the sole matter of the first Bill of Exceptions.

Who Mrs. Garlock was; when this was; what "vicinity" was referred to; where the rags were; when she smelled them; who had supplied the rags, we are in no way advised. We submit, in the first place, that the Bill of Exception does not disclose any foundation for the expression of an opinion by this witness; and secondly, that what was evidently the mere supposition or opinion of the witness was clearly inadmissible upon plain rules of evidence.

The second exception is on page 29 of the record. John W. Stonebraker, one of the defendants, being on the witness stand, his counsel proposed to ask him what he estimated the amount of defendants' damages to be, to which plaintiffs' counsel objected that it was not competent for the witness to give a lumping estimate of the defendants' damages, but that he should specify the items of damage and testify to facts, his opinion being inadmissible; which objection the Court sustained and defendants excepted.

This evidence was clearly inadmissible. The amount of damages was for the jury to say from facts in evidence, and we submit that it would have been highly improper to have permitted the defendants themselves to testify that they had been damaged in some stated sum, and to have forced the plaintiff to extract the items of damage on cross-examination. The authorities are uniform and explicit upon this question.

17 Wend., 161, *Norman* vs. *Wells*.

Action for breach of covenant not to establish another saw mill on a certain stream. Another mill was established and the Trial Court permitted several witnesses to testify as to the amount of damage.

Justice COWEN, in delivering the opinion of the Court, says:

> "Ought the opinion of witness to have been received to the amount of damages?
>
> The proposition, as I understand it, was to take the abstract opinion of the witnesses on an examination in chief, subject only to the right of cross-examination. It was not pretended that the knowledge of both or either covered the whole ground, or if it did, they were not confined to such knowledge. They were at liberty to speak from facts known to them; and equally so, for aught I see, to what had been proved by others, and even to go into the regions of speculation and guess upon the whole amount of damages. It was certainly a question resting upon very complicated premises, as is evident from the numerous witnesses and the multifarious proof on the trial. What amount of business did the plaintiffs' factory in truth perform? What was the extent of local demand for work? What was the style of his workmanship; good or bad? If such as to command custom, then to what extent would his power, his time, and other means reach? Was he sober and industrious? What deductions from his profits were made by the operation of the rival factory; or if that were out of the way, what would be done by others, either already established, or which would be established? With many other facts to which, at least to all of which, no individual could speak from actual knowledge. The ordinary, and in general, the only legal course is, to lay such facts before the jury as have a bearing on the question of damages, and leave them to fix the amount. They are the only proper judges. They are impartial and capable of entering into these ordinary matters. Witnesses are, in such cases, unavoidably governed by their feelings, and their prejudices gathered from many sources. This was not a

matter of science. That I admit forms an exception to the general rule, that *facts*, not *opinions*, must be received; the facts relevant to the question before the jury."

4 Denio, 312, *Fish* vs. *Dodge*.

Action against a manufacturer of engine boilers for damage from noise and dust, plaintiff owning adjoining dwelling and keeping boarding house. After proving by a witness the injury complained of, the plaintiff asked what, in the opinion of the witness, was the amount of damage. The trial Court permitted the question to be put. The Court of Appeals (p. 318) held it clearly wrong, stating that it was the business of the witness to state facts, and of the jury to assess damages.

5 Hill, 563, *Paige* vs. *Hazard;*
3 Hill, 609, *Dunham* vs. *Simmons;*
2 N. Y. 514, *Morehouse* vs. *Mathews*.

The rule permitting the opinions of witnesses to be given is confined to the admissibility of the opinions of scientific men upon questions of science or skill, otherwise opinions are not admissible. 1 Ph. Ev., 778, 4th Am. ed.

The 3d exception, Rec. 29.—

The Court refused to permit a witness to testify that two of his children had taken the small-pox from playing with infected rags.

This, besides being merely a matter of opinion, is too vague and indefinite. It does not appear whether it was offered in order to show that children could take the small-pox from infected rags or that the witness' children had taken the small-pox from the rags in question.

The 4th exception (Rec., p. 34) is one exception to all of four different propositions in the charge of the court. Under

the decisions of this Court, if either of the propositions thus excepted to was correct, then the exception cannot prevail.

1 Bl., 209, *Johnson* vs. *Jones;*
1 Wall., 644, *Rogers* vs. *The Marshall;*
2 Wall., 328, *Harvey* vs. *Tyler;*
7 Wall., 132, *Lincoln* vs. *Claflin;*
93 U. S., 46, *Beaver* vs. *Taylor;*
111 U. S., 335, *Monlor* vs. *Ins. Co.*

The first proposition of the charge excepted to is that the plaintiff *knew* that the rags were infected with small-pox when he shipped them to defendants, and in so doing acted in positive bad faith. Now it may be that there was some evidence to go to the jury that, as matter of fact, the rags were infected with small-pox, but the only evidence of knowledge on the part of the plaintiff below that they were so infected is the testimony of the plaintiff himself, examined by the defendant, that he had no such knowledge; that to the best of his knowledge and belief the rags were clean and free from disinfectants.

The same applies to the second proposition that there was no evidence *sufficiently* showing that the plaintiff was guilty of culpable negligence in the purchase of these rags.

The third proposition was that—

> "The damages claimed by the defendants (if not in their nature too *remote* and *speculative*), are, it seems to me, *altogether uncertain under the evidence.* I am of the opinion and charge you, that the evidence in the case is not such as would enable the jury to ascertain the amount of damages, if any, which the defendant sustained."

Was not this statement clearly correct? Can any one read the evidence in the record and say, without the wildest speculation, and guessing what amount of damages, if any, the defendants did sustain?

The evidence upon this point is very brief, and is wholly void of definiteness.

The only amount specified is $200, expended by the defendants for provisions, coal and other necessaries furnished to sick hands and their families. This, while an act of charity, creditable to the defendants, is clearly not an item of damages for which the plaintiff could have been held responsible.

The only other evidence was the following:

The mill was short handed, and there was a loss in production. The country supply of rags fell off.

Defendants got rags from Norfolk, which cost them eight cents a hundred pounds more than they had been paying for country rags; and they had a profitable country trade which left, thereby, making a considerable loss to the mill.

This is all the evidence as to the amount of damage sustained by the defendants.

Could any jury in the world, from this uncertain evidence, state the amount of damages?

Did not the Court do right, and state truly, in saying to the jury, the evidence in the case is not such as would enable you to ascertain the amount of damages, if any, which the defendants sustained.

To what extent the supply of country rags or country trade fell off, the jury was not informed. How many pounds of Norfolk rags, at an additional cost of eight cents per one hundred pounds, were bought, the jury was not told.

They were not informed whether the business done by the defendants prior to the purchase of these rags was profitable or not; nor, if profitable, to what extent—nor whether after the use of these rags, there was any falling off in profits.

As to this alleged set-off, the defendants below were in the position of plaintiffs, and it was their duty under the law, to furnish the jury with the best evidence in their

power; and, not doing so, the presumptions of law were against them. It is manifest, that if they had sustained damage as alleged, it was within their power to have furnished the jury, from their books, evidence of the amount and extent of their business; of the amount of profits realized from it, and its diminution in value and profits after the small-pox set in.

They did not see proper to do this, even after the Court had refused Mr. Stonebraker the privilege of guessing at the amount of loss in a lump sum.

They seek to avoid this difficulty by *now* claiming that they were entitled to vindictive and exemplary damages.

Saying nothing about the other lack of evidence to warrant this claim, it is sufficient to call the attention of the Court to the fact that no such issue was presented by the pleadings, general as they are, nor was any such claim made in the Court below, and it is presented in argument for the first time in this Court.

In their first affidavit of defence (Rec. 6) defendants claimed they had sustained "a pecuniary loss of the amount of plaintiff's claim."

In their supplemental affidavit (Rec. 11) defendants claim is that "by reason of the premises and of the interruption of defendant's business occasioned thereby, money paid for the support of those disabled by said disease, injury to defendant's said business, &c., defendants suffered loss and were put to expense far exceeding the amount of plaintiff's bill.

It is respectfully submitted that either the writ of error should be dismissed for want of jurisdiction or the judgment below affirmed.

WM. F. MATTINGLY,
SIMON WOLF,
Attorneys for Defendant in Error.

3 Sheets—Sheet 3.

A. Q. REYNOLDS.

AUTOMATIC FRUIT DRIERS.

No. 190,368. Patented May 1, 1877

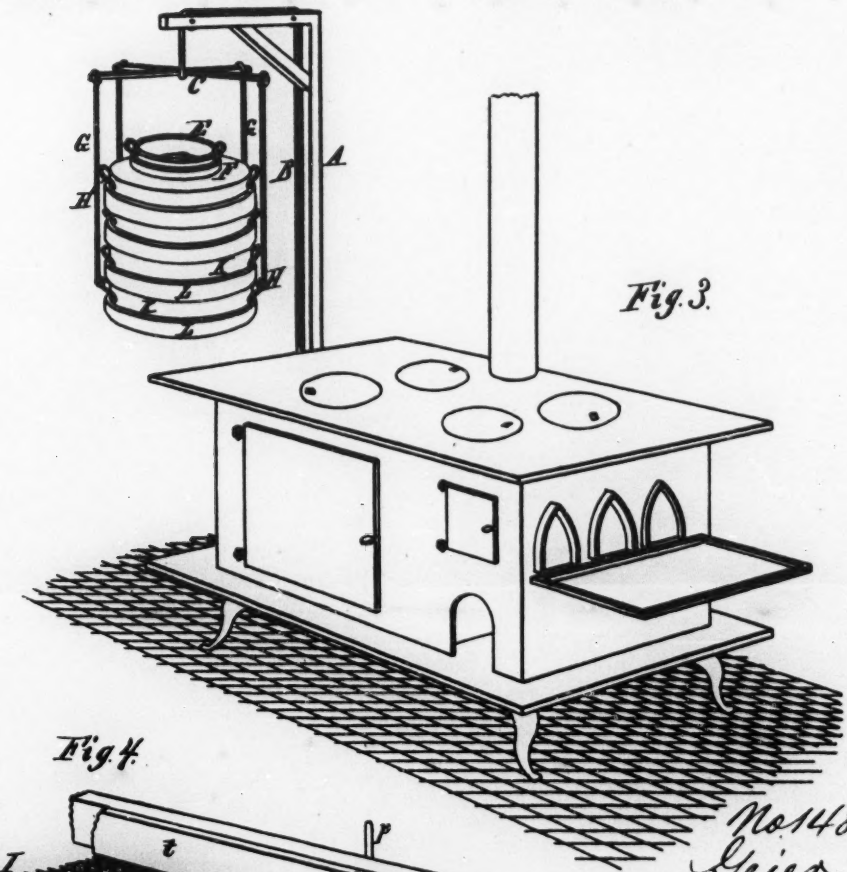
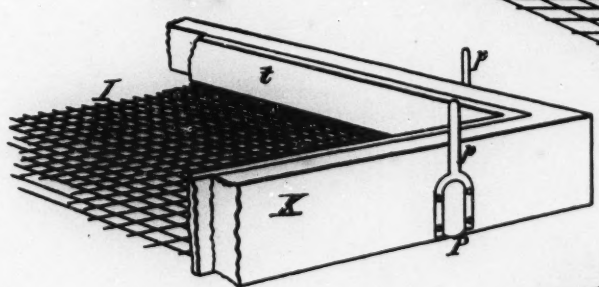


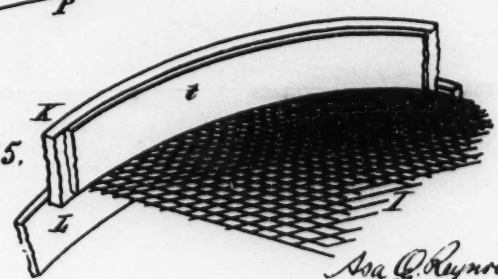
Fig. 3.

Fig. 4.



No 148. Grier Wet. p. 54

Fig. 5.



Attest:-
C. F. Searle.
D. P. Lowe

Asa Q. Reynolds,
Inventor.
By North Reynolds
Attorney.

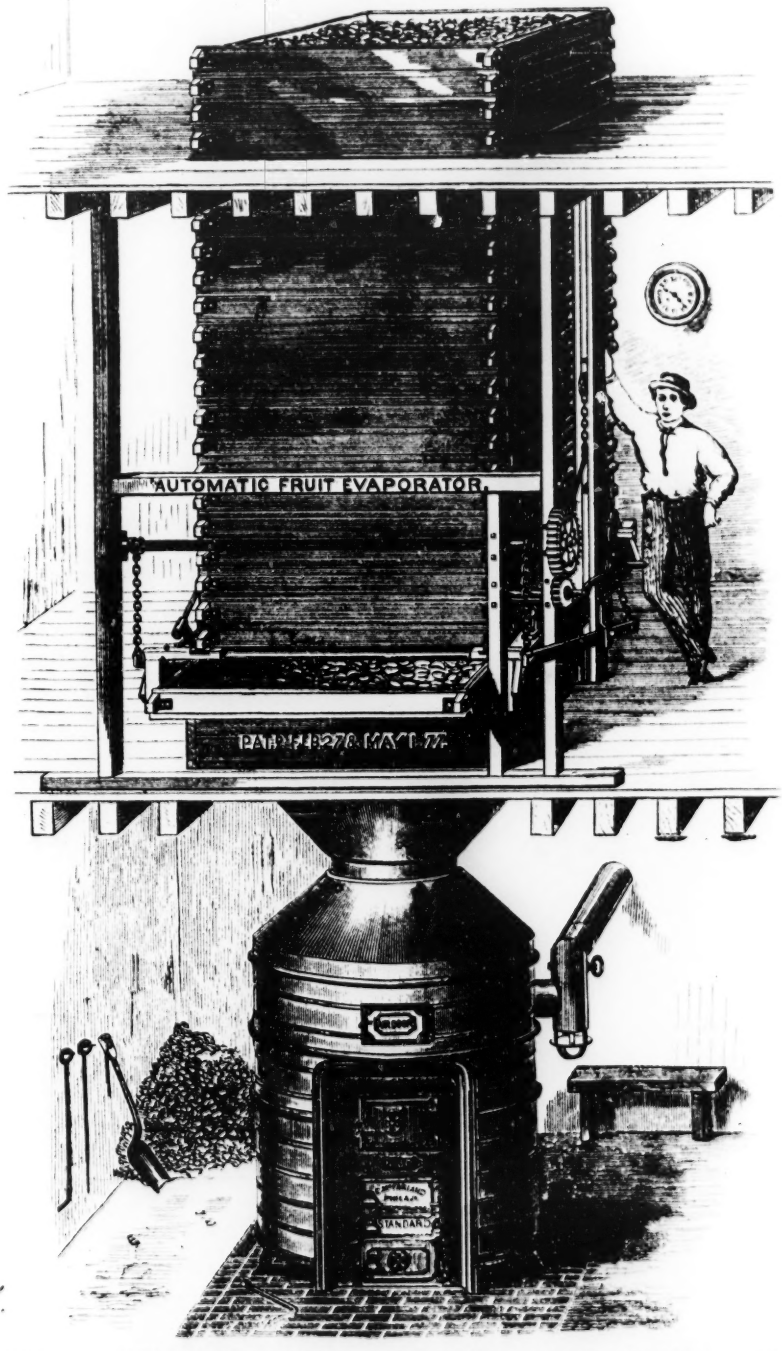
57

A NEW AMERICAN INDUSTRY.

The Desiccation of Fruits & Vegetables,

BY THE

AUTOMATIC EVAPORATOR.



AUTOMATIC EVAPORATOR.

No 148. Grier & Wilt p. 67.

THE AUTOMATIC FRUIT EVAPORATOR

MANUFACTURED AND FOR SALE AT THE

Factories of EDWARD McFARLAND, 112 N. 6th St.

JOHN F. WILT, 721 N. Front St., PHILADELPHIA.

2 Sheets--Sheet 1.

J. O. BUTTON.

Fruit-Driers.

No. 155,286. Patented Sept. 22, 1874.

Fig. 1.

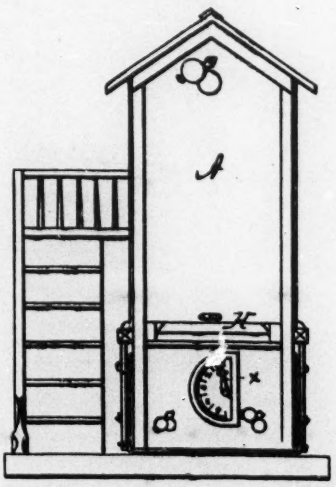


Fig. 2.

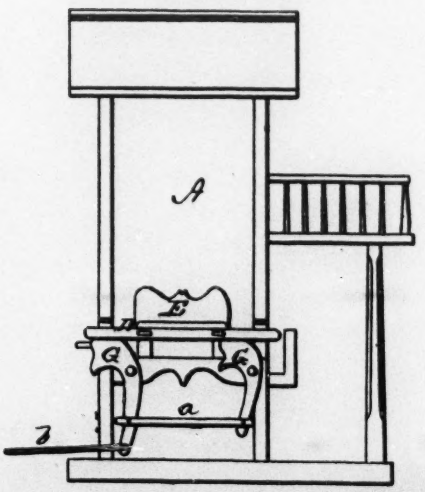


Fig. 3.

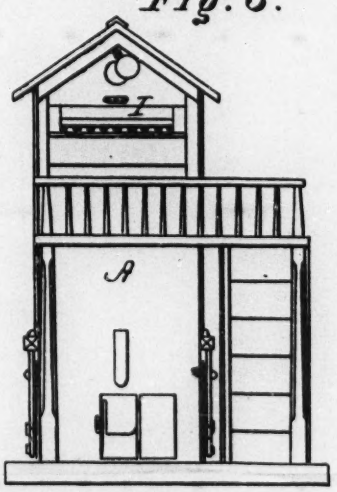


Fig. 4.

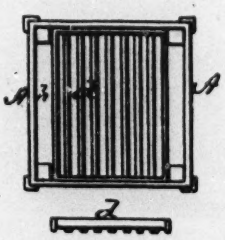
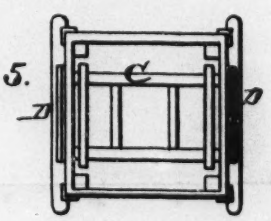


Fig. 5.



No. 148.
Grier
& Witt.
$125

Witnesses;
L. P. Himer
C. L. Emerh.

Inventor;
J. Orlando Button
By J. McC. Perkins,
Attorney.

125

AMOUNT

$ _____

PREMIUM

$ _____

THE ACCIDENT INSURANCE COMPANY

OF NORTH AMERICA.

HEAD OFFICE, - - - - MONTREAL.

In Consideration of the warranties made in the application for this Insurance, and of the sum of _____ 100 **Dollars,**

This Company hereby Insures _____ by occupation, profession, or employment a _____ residing at _____ in the County of _____ and Province of _____ hereinafter styled the Insured, in the Principal Sum of _____ Dollars, for term of _____ months, ending on the _____ day of _____ in the year of our Lord one thousand eight hundred and eighty-_____ at 12 o'clock noon. The said sum insured to be paid to _____ or _____ legal representative, within thirty days after sufficient proof that the Insured, at any time within the continuance of this Policy, shall have sustained bodily injuries, effected through EXTERNAL, ACCIDENTAL AND VIOLENT MEANS, within the intent and meaning of this contract and the conditions hereunto annexed, and such injuries alone shall have occasioned death within ninety days from the happening thereof; or, if the Insured shall sustain bodily injuries by means as aforesaid, which shall, independently of all other causes, immediately and wholly disable and prevent him from the prosecution of any and every kind of business, pertaining to the occupation under which he is insured, then, on satisfactory proof of such injuries he shall be indemnified against loss of time caused thereby, in the sum of _____ Dollars per week, for such period of continuous total disability as shall immediately follow the accident and injuries as aforesaid; not exceeding, however, twenty-six consecutive weeks from the time of the happening of such accident. He is insured under Classification _____, but it is understood and agreed that in the event of his being either fatally injured or otherwise disabled in consequence of his engaging, temporarily or otherwise, in any act or occupation of a higher or more hazardous Classification according to this Company's tariff,—or if not specially mentioned in the Company's tariff, approximating thereunto,—this insurance shall not be forfeited or voided, but he shall receive compensation to an amount proportionate to that which the premium he has paid would insure him under such higher Classification.

Provided always, That if this Policy, or any renewal thereof, has been, or shall be, obtained through misrepresentation, fraud or concealment, or if any fraudulent attempt shall be made to obtain any sum under this Policy, then the same shall be absolutely void.

Provided always, That this Insurance shall not extend to hernia, nor to any bodily injury of which there shall be no external and visible sign; nor to death or disability which may have been caused wholly or in part by bodily infirmities or disease, or by the taking of poison, or by any surgical operation or medical or mechanical treatment. And no claim shall be made under this Policy when the death or injury may have been caused by duelling, fighting, wrestling, unnecessary lifting, or by over-exertion, or by suicide, or by freezing, or sunstroke, or SELF-INFLICTED INJURIES; or by concealed weapons carried by the Insured, or when the death or injury may have happened in consequence of war, riot, or invasion, or of riding or driving races, or of voluntary or unnecessary exposure to any obvious danger, hazard or perilous adventure, (*unless in the humane effort to save human life, or in the occasional temporary performance of any reasonable duty towards a fellow creature,—or in pursuance of or obedience to the reasonable requirements of an Employer or Superintendent*), or of violating the rules of any company or corporation, or when the death or injury may have happened while the Insured was, or in consequence of his having been under the influence of INTOXICATING DRINKS, or taking part in gymnastic sports, (except for amusement) or while engaged in or in consequence of any unlawful act, or from assault provoked by quarrelling. And this insurance shall not be held to extend to mysterious disappearances, nor to any case of death or disability, the nature, cause or manner of which is unknown, or incapable of direct and positive proof.

Provided always, That if the Insured shall travel or be beyond or without the limits of travel and residence hereinafter prescribed, without first obtaining from this Company or one of its agents a "PERMIT," and paying the extra premium therefor, then this Policy shall be wholly void as to all accidents occuring beyond such limits. Said limits of travel and residence are as follows: The Dominion of Canada, and Newfoundland, and the inhabited portions and civilized abodes of the United States of America, and Mexico, and coastwise by regular lines of passenger or mail conveyance from port to port on the Atlantic or Pacific coast, or Gulf of Mexico. The Insured is permitted also, under the Annual Policies of this Company, to travel to and from and reside in Europe without extra premium. No insurance is granted under this contract against any fatal or non-fatal injuries caused by hostile Indians.

Provided always, That all sums which may be paid by way of Indemnity to the Insured, by virtue of this Policy, shall be accounted in diminution of the principal sum hereby insured, so that in case of subsequent death or injury, during the continuance of this Policy, and the year in which such Indemnity may have been paid, the total amount to be paid by the said Company shall not in any case exceed the principal sum hereby insured.

This Policy is subject also to the following:—

1. The Insured shall use due diligence for personal safety and protection. In the event of any accident happening to him, immediate notice shall be given in writing to this Company, at Montreal, or to the Agent who countersigned his Policy, stating the full particulars of the accident; and failure to give such notice shall invalidate all claims under this Policy; and unless direct and affirmative proof of the death or duration of total disability, be furnished within seven months from the happening of the accident, then all claims under this Policy shall be waived and forfeited to the Company.
2. No suit or proceeding at law or in equity shall be brought to recover any sum hereby insured, unless the same is commenced within one year from the time the right of action accrues.
3. The Insured shall not be entitled to indemnity for disabling injuries beyond the amount of his ordinary wages, salary or the money value of his time (with power to the Directors to remit the condition) during the period of continuous disability, not exceeding twenty six weeks as aforesaid.
4. No claim shall be payable under this Policy, unless timely and sufficient notice has been given the Company whereby any medical adviser of the Company shall be able to examine the person of the Insured in respect of any alleged injury or cause of death, and the Company's medical adviser shall be allowed to see and examine the injury, when and so often as may be reasonably required on behalf of the Company.
5. The risk taken by this Company on any one life is limited to Six Thousand Dollars, and Fifty Dollars Weekly Indemnity; and no insurance to any further amount in this Company, whether effected by Policy or Ticket, shall hold good against the Company.
6. If the Company shall so elect, this Policy may be cancelled at any time, by refunding to the Insured the Premium paid by him, less a *pro rata* part thereof for the time said Policy has been in force.
7. The *actual payment of Premiums* by the Insured, before the happening of any accident under which claim for loss may be made, as well as all the provisions and conditions aforesaid and a strict compliance therewith during the continuance of this Policy, are conditions precedent to the making of this contract, and no waiver shall be claimed by reason of the act or acts of any local agent, unless such act or waiver be specially authorised in writing, over the signature of the President or Secretary of this Company.
8. This Policy is issued only upon the express condition that the person or persons, if other than the Insured, who have procured this Insurance from this Company, shall be deemed the Agent or Agents of the *Insured*, and *not of this Company*, in any transaction relating to this Insurance.

In witness whereof, THE ACCIDENT INSURANCE COMPANY OF NORTH AMERICA, *has caused these Presents to be signed by its President and Secretary and delivered at the Head Office in the City of Montreal, and this Policy countersigned by* CANCELLED *Agent of this Company at* CANCELLED

Attestation:

Countersigned at CANCELLED

this _____ *day of* _____ 188

CANCELLED Agent.

CANCELLED President.

CANCELLED Secretary.

17808

CLASSIFICATION REFERRED TO IN THE POLICY.

Class No. 1. "Preferred."

RATE.—$5.00 per $1,000 Insurance and $5.00 Weekly Indemnity; or, $3.00 per $1,000 for Death only; $3.00 for $5.00 Indemnity only.

Class No. 2. "Inter-Ordinary."

RATE.—$6.00 per $1,000 Insurance and $5.00 Weekly Indemnity; or, $3.60 per $1,000 for Death only; $3.60 for $5.00 Indemnity only.

Class No. 3. "Ordinary."

RATE.—$7.50 per $1,000 Insurance and $5.00 Weekly Indemnity; or, $4.50 per $1,000 for Death only; $4.50 for $5.00 Indemnity only.

Class No. 4. "Extra Ordinary."

RATE.—$8.00 per $1,000 Insurance and $5.00 Weekly Indemnity; or, $5.00 per $1,000 for Death only; $5.00 for $5.00 Indemnity only.

Class No. 5. "Medium."

RATE.—$10.00 per $1,000 Insurance and $5,00 Weekly Indemnity; or, $6.00 per $1,000 for Death only; $6.00 for $5.00 Indemnity only.

Class No. 6. "Special."

RATE.—$12.50 per $1,000 Insurance and $5.00 Weekly Indemnity; or, $7.50 per $1,000 for Death only; $7.50 for $5.00 Indemnity only.

Class No. 7. "Hazardous."

RATE.—$15.00 per $1000 Insurance and $5.00 Weekly Indemnity; or, $9.00 per $1,000 for Death only; $9.00 for $5.00 Indemnity only.

Class No. 8. Engineers' Class.

RATE —$16,00 per $1,000 Insurance and $5,00 Weekly Indemnity; or, $9.60 per $1,000 for Death only; $9.60 for $5.00 Indemnity only.

Class No. 9. "Extra Hazardous."

RATE.—$20.00 per $1,000 Insurance and $5.00 Weekly Indemnity; or, $12,00 per $1,000 for Death only; $12.00 for $5.00 Indemnity only.

Class No. 10. "Special Hazardous."

RATE.—$25,00 per $1,000 Insurance and $5.00 Weekly Indemnity; or, $15.00 per $1.000 for Death only; $17.50 for $5.00 Indemnity only.

Class No. 11. Extra Special Hazardous.

RATE.—$30,00 per $1,000 Insurance and $5.00 Weekly Indemnity; or, $18,00 per $1,000 for Death only, $21.00 for $5.00 Indemnity only.

Class No. 12. "Special Contract."

THE ACCIDENT

Insurance Company

OF NORTH AMERICA.

POLICY

ON THE LIFE OF

Number .....

Date *188*

Term of ..... *Months.*

Amount Insured, $ .....

Weekly Indemnity, $ .....

Premium, - - $ .....

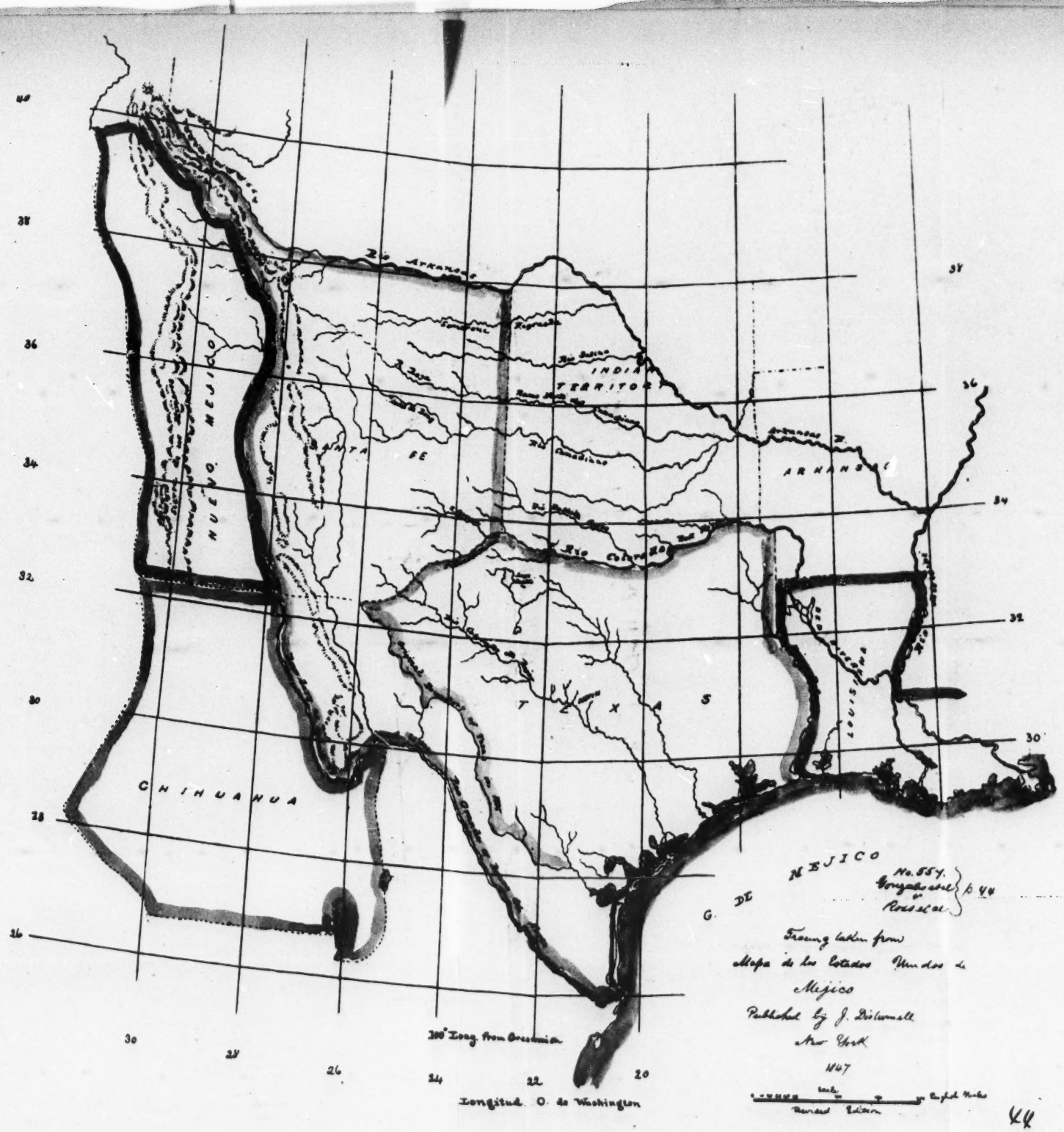
NOTICE RESPECTING ASSIGNMENTS.

The Principal Sum insured herein can be assigned only by the person or persons to whom it is by the term of the Policy, made payable; and such Principal Sum is always subject to diminution to the extent of the Weekly Indemnity paid to the Insured.

The weekly indemnity herein Insured can be assigned only by the person whose life is insured.

A copy of every Assignment must be given to the Company within thirty days after execution.

Any claim under this Policy made by an Assignee shall be subject to proof of Interest.



MEJICO

No. 554. Geographical Progress of Research } p. 44

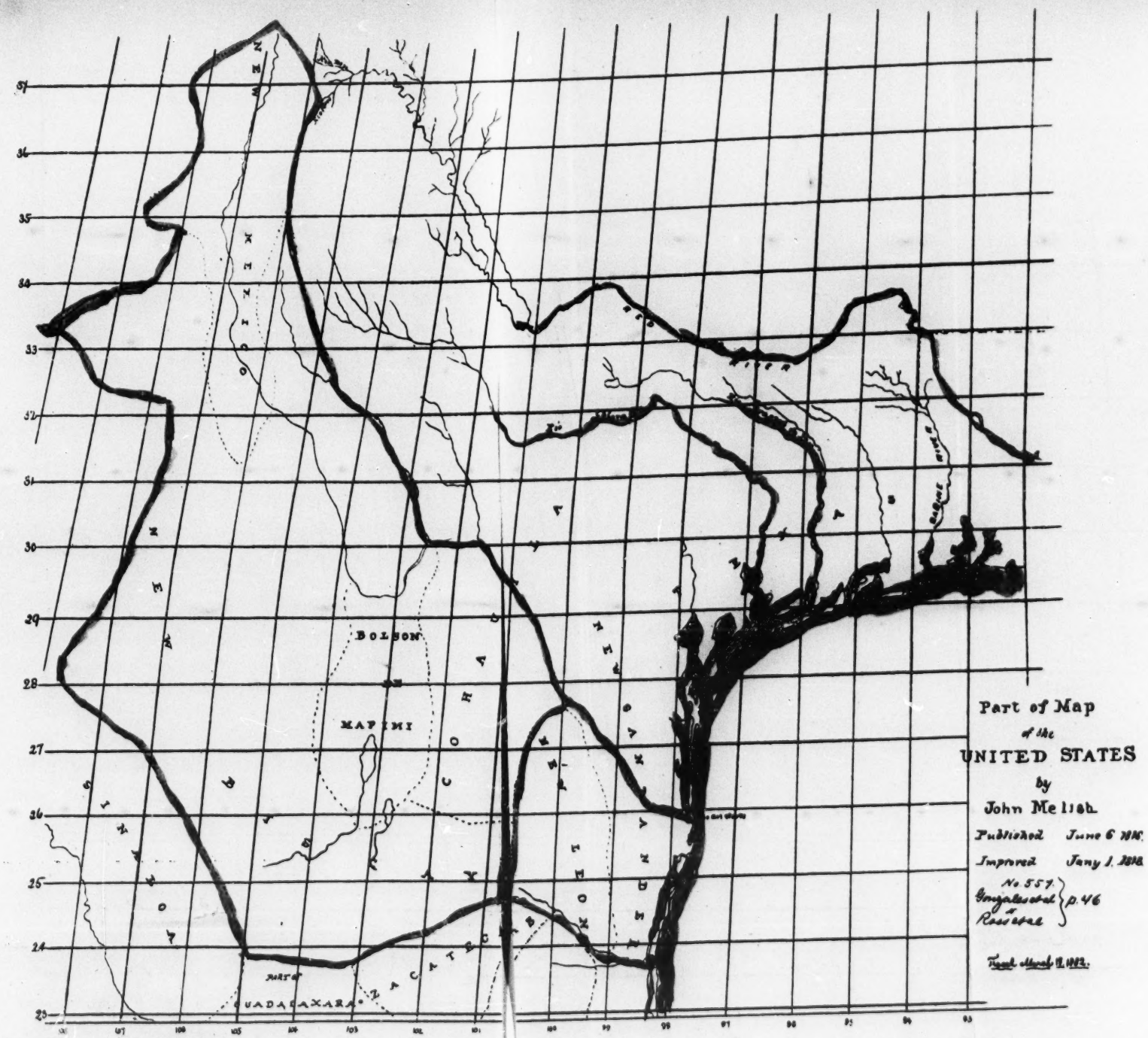
Tracing taken from Mapa de los Estados Unidos de Mejico

Published by J. Disturnell New York 1847

Scale. English Miles

Bureau Edition

44


NEW MEXICO
TEXAS
BOLSON DE MAPIMI
SIERRA MADRE OCCIDENTAL
SIERRA MADRE ORIENTAL
MESA CENTRAL
GUADALAJARA
Part of Map
of the
UNITED STATES
by
John Melish.
Published June 6 1816
Improved Jany 1. 1818
No 557
Geographical & Reserved } p. 46

46

MAPA

DE LAS

PROVINCIAS INTERNAS

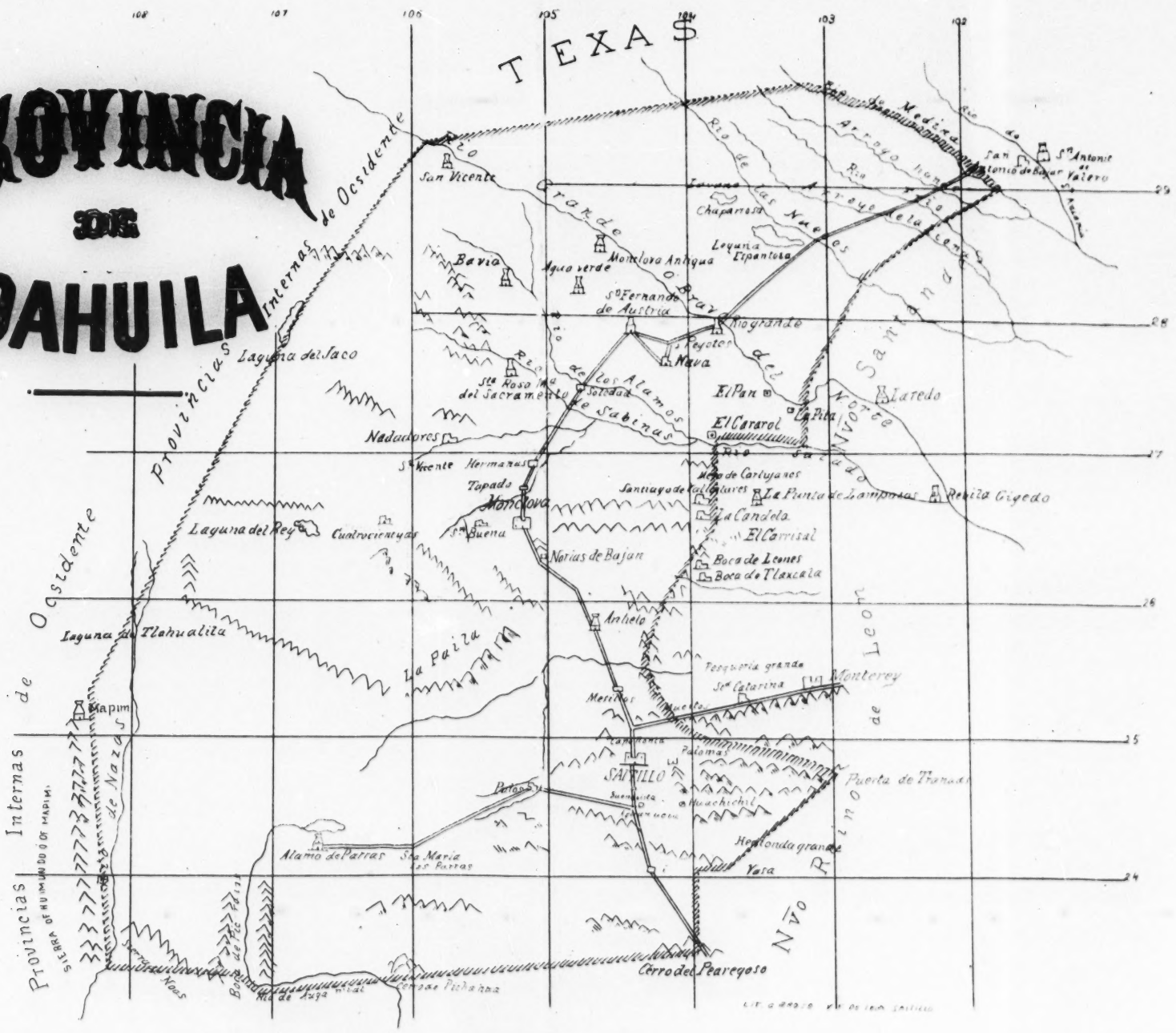
DE

ORIENTE

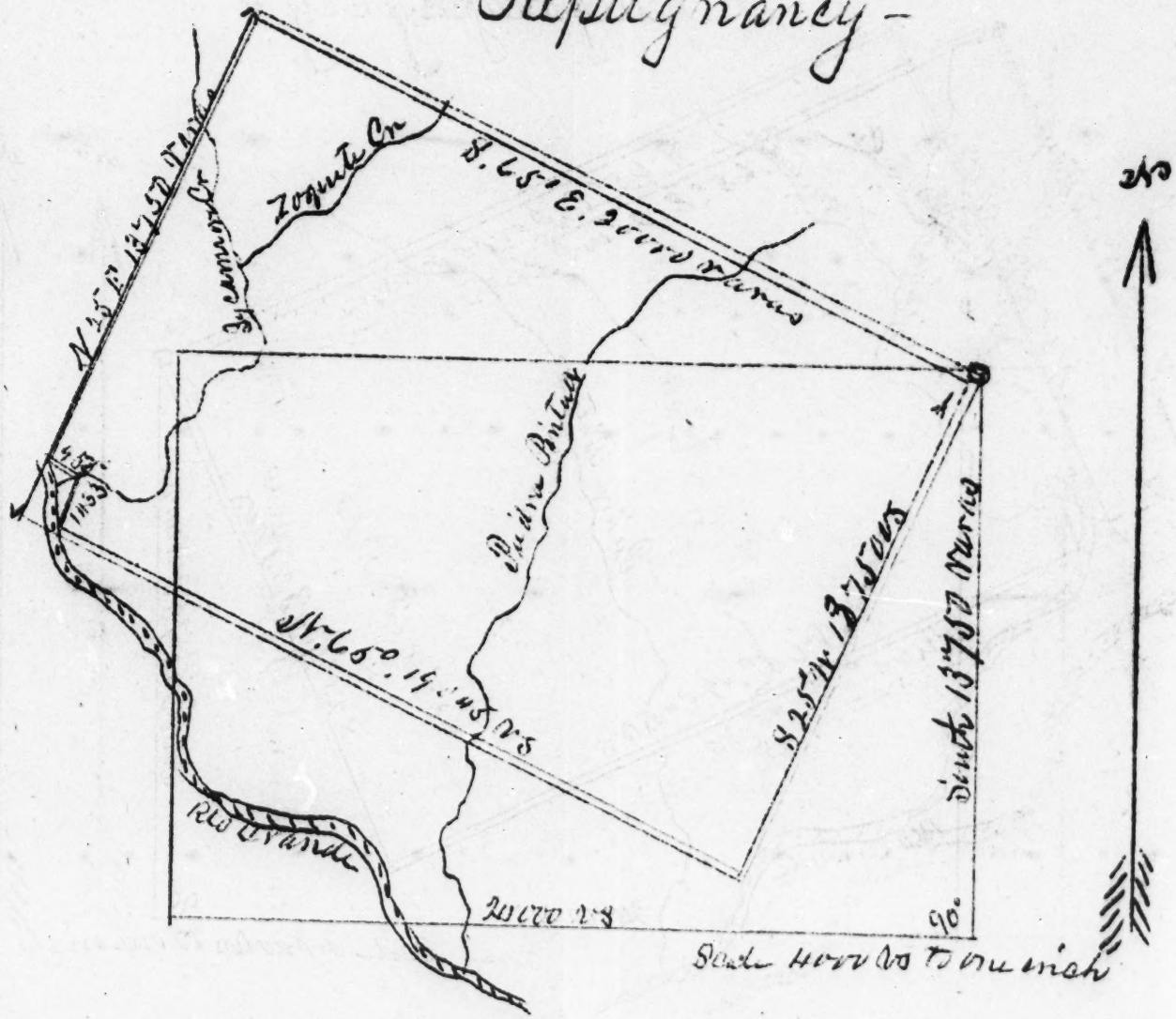
PROVINCIA

DE

COAHUILA



Repugnancy –


Zoquete Cr
Piedra Bitada
Rio Grande
90°
Scale Here as to Furnish